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BEFORE THE ARIZONA CORPORATION

COMMISSIONERS

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

In the matter of: TRI-CORE COMPANIES, LLC, an Arizona limited liability company, TRI-CORE MEXICO LAND DEVELOPMENT, LLC, an Arizona limited liability company, TRI-CORE BUSINESS DEVELOPMENT, LLC, an Arizona limited liability company, ERC COMPACTORS, LLC, an Arizona limited liability company, ERC INVESTMENTS, LLC, an Arizona limited liability company, C&D CONSTRUCTION SERVICES, INC., a Nevada corporation; PANGAEA INVESTMENT GROUP, LLC, an Arizona limited liability company, d/b/a Arizona Investment Center, JASON TODD MOGLER, an Arizona resident, BRIAN N. BUCKLEY and CHERYL BARRETT BUCKLEY, husband and wife, CASIMER POLANCHEK, an Arizona resident, NICOLE KORDOSKY, an Arizona resident, Respondents.	DOCKET NO. S-20867A-12-0459 **SECURITIES DIVISION'S POST HEARING BRIEF** **Hearing Dates: October 21-23, 2013, February 18-20, 2014, May 6-8, 2014**

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The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") submits its Post-Hearing Brief ("Brief") with respect to the administrative hearing held on October 21-23, 2013, February 18-20, 2014, and May 6-8, 2014. This Brief is supported by the following Memorandum of Points and Authorities.

MEMORADUM OF POINTS AND AUTHORITIES

I. Procedural Background

The Division filed this action on November 8, 2012. On November 26, 2013, Respondent C&D Construction Services, Inc. ("C&D") filed a Request for Hearing. On November 30, 2012 Respondents Jason Mogler ("Mogler"), Tri-Core Companies, LLC ("TCC"), Tri-Core Business Development, LLC ("TCBD"), ERC Compactors, LLC ("ERCC"), and ERC Investments, LLC ("ERCI") filed a Request for Hearing. Respondents Brian and Cheryl Buckley also filed a Request for Hearing on November 30, 2012. On January 29, 2013, Respondent Nicole Kordosky ("Kordosky") filed a Request for Hearing.

Default orders were entered against Respondents Pangaea Investment Group, LLC d/b/a Arizona Investment Center ("Pangaea" or "AIC") and Tri-Core Mexico Land Development, LLC ("TCMLD") on February 6, 2013. *See* Decisions 73666, 73777. On May 8, 2013, a default order was entered against Respondent Casimer Polanchek ("Polanchek"). *See* Decision 73867.

This matter went to hearing on October 21-23, 2013, with the Division presenting evidence. Despite the fact that the hearing was scheduled to proceed for two weeks, the hearing was continued on October 23rd after counsel for Mogler, TCC, TCBD, ERCC, and ERCI represented that he had a newly identified conflict of interest in his representation of ERCC and ERCI.[1]

On October 25, 2013, a consent order as entered against Respondents Brian and Cheryl Buckley. *See* Decision 74147. A consent order was entered against Kordosky on January 7, 2014. *See* Decision 74251.

[1] *See* Hearing Transcript ("HT") Vol. III.

On November 1, 2013, counsel moved to withdraw from representation for ERCC and ERCI citing the conflict asserted in October. Judge Stern ordered ERCC and ERCI to enter an appearance in the docket by December 6, 2013 if they intended to participate in the proceedings. *See* Seventh Procedural Order. Through counsel, ERCC and ERCI docketed a letter to Judge Stern dated December 6, 2013, indicating that no appearance would be filed by ERCC and ERCI. *See* Letter dated December 6, 2013 from Jennifer Stevens.

On January 22, 2014, counsel for C&D filed a motion to withdraw from representation. On the same date, counsel for Mogler, TCC, and TCBD moved to continue the hearing that was scheduled for February 3, 2014. The motion to withdraw as counsel for C&D was granted and the hearing was continued to February 18, 2014 by procedural order. *See* Ninth Procedural Order.

On January 13, 2014, counsel filed a Notice of Withdraw [sic] of counsel for Mogler, TCC, and TCBD. On February 6, 2014 (and again on February 11, 2014), Mogler, appearing on his own behalf and for TCC and TCBD, filed a Motion to Continue the February 18, 2014 hearing. After a status conference, Judge Stern granted counsel's motion to withdraw on behalf of Mogler, TCC and TCBD, allowed the hearing to proceed for the Division's case in February, and granted Mogler's request for a continuance until May 2014 to present his defense. *See* Eleventh Procedural Order.

The Division finished presenting its case on February 18-20, 2014, and Mogler, TCC and TCBD presented their case, with the Division presenting rebuttal, on May 6-8, 2014.

This brief only addresses the allegations concerning Respondents that do not already have orders issued against them by the Commission: Mogler, TCC, TCBD, ERCC, ERCI, and C&D.

II. Jurisdiction

The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution and the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.*

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III. Facts

This matter involves note investments offered and sold in or from Arizona related to two categories: (1) Mexican land, and (2) recycling. Various "Tri-Core" entities were the issuers of the Mexican land investments, and the ERC entities and C&D issued the recycling investments.[2] Facts relating to each offering are outlined below.

A. TCMLD Investment – Lot 5

1. The TCMLD Offering – Lot 5.

TCMLD is a manager-managed limited liability company organized in Arizona in May 2007. Since inception, James Lex Stevens ("Stevens") has been the manager and member, with Sylvia Torres Macker and Mogler also members.[3]

TCMLD issued a private placement memorandum ("PPM") dated May 1, 2007 offering notes to investors at an 80% rate of return, compounded annually, with a maturity date for payment of both interest and principal 24 months from the date of commencement of each note.[4] The total offering was not to exceed $3,500,000. During all relevant time periods, TCMLD has not been registered with the Commission as a securities dealer, nor was this offering.[5]

In addition to the PPM, investors executed and received a subscription agreement and note issued by TCMLD (hereafter collectively "TCMLD investment documents"). The TCMLD investment documents stated that "use of the proceeds is to purchase a water front subdivision in San Luis Rio Colorado, Sonora, Mexico". Investors were advised that investment property was Mexican real estate known as "Lot 5".[6] According to Stevens, Lot 5 is made up of five separate parcels of land, Parcels 1-5, and is roughly 250 acres of beachfront land.[7]

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[2] HT Vol. I, p. 36, ln. 10 – p. 37, ln. 1.
[3] Exs. S-3, S-123.
[4] Exs. S-52 – S-94, S-104 – S-105, S-107 – S-109, S-111 – S-113, S-253.
[5] Ex. S-1(b).
[6] Exs. S-104, S-109, S-122; HT Vol. IV, p. 479, ln. 10 – p. 480, ln. 10; HT Vol. VI, p. 690, ln. 20 – p. 691, ln. 1; HT Vol. VII, p. 825, lns. 6-10.
[7] HT Vol. VII, p. 783, lns. 9-12, p. 784, lns. 15-18, p. 798, ln. 22 – p. 799, ln. 6.

Pursuant to an agreement between TCMLD and TCBD, TCBD acted as agent for TCMLD for the TCMLD offering, raising capital and holding and distributing investor funds.[8] TCBD is an Arizona limited liability company organized in January 2006 as a member-managed company.[9] In November 2007, TCBD was converted to a manager-managed company, with Mogler as the managing member.[10] Mogler signed the agreement between TCMLD and TCBD on behalf of TCBD, and also signed the TCMLD investment documents as "Principal" of TCMLD.[11] Mogler has never been registered as a securities dealer or salesman with the Commission.[12]

The TCMLD investment documents instructed investors to forward their investment documents to TCMLD, and to wire or make their investment checks payable to TCBD, both at the same address in Scottsdale, Arizona.[13] Stevens testified that TCBD received all investor funds as a "clearing account."[14] During the relevant period, Mogler was a signatory on TCBD bank accounts, and received the bank statements at his home address.[15] TCBD has not been registered with the Commission as a securities dealer or salesman during the relevant time period.[16]

According to documents produced by Mogler, TCMLD had over eighty investors in Lot 5, and raised a total of $1,300,000.[17] Over fifty of those investors were offered and sold the investments in or from Arizona, totaling $1,165,000 of the total invested.[18] Out of state residents that invested in the TCMLD offering either returned their investment documents and funds to Arizona, were solicited when in Arizona, or were solicited through the mail or email from Arizona.[19] Note holders had no managerial rights or powers.[20]

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[8] Ex. S-124.
[9] Ex. S-4(a).
[10] Ex. S-4(b).
[11] *See e.g.* Exs. S-107 at ACC000187, S-124 at TRI_MDL000121.
[12] Ex. S-1(i).
[13] *See e.g.* Exs. S-107 at ACC00177, 00179, S-119.
[14] HT Vol. VII, p. 839, lns. 6-12.
[15] Exs. S-17 at ACC003981-3994, 4405-4407, S-27 at p. 9.
[16] Ex. S-1(c).
[17] Exs. S-33, S-50, S-51, S-95 – S-98, S-114; HT Vol. I, p. 68, ln. 10 – p. 71, ln. 9, p. 109, lns. 5-20.
[18] Ex. S-33, S-50 – S-105, S-107 – S-109, S-111 – S-116, S-219, S-253; HT Vol. I, p. 41, ln. 24 – p. 47, ln. 2, p. 66, ln. 17 – p. 109, ln. 5 – p. 220, ln. 16; HT Vol. VII, p. 839, ln. 13-18.
[19] HT Vol. I, p. 49, ln. 3-12, HT Vol. IV, p. 462, ln. 2 – p. 465, ln. 10, p. 468, ln. 25 – p. 469, ln. 10.
[20] *See e.g.* Exs. S-107 at ACC000168.

Despite the fact that all notes with TCMLD have passed the two year term, there is no evidence that investors have been repaid at all.[21] TCMLD has never purchased Lot 5, or any other Mexican property with the investors' funds.[22] Despite this, Stevens testified that investor funds have been completely spent. Among the expenditures, TCBD was paid approximately $925,000 in upfront consulting fees, $150,000 was paid as a deposit for a contract to purchase Lot 5, the rights under which have been in dispute in Mexico since 2007, and funds have gone to attorneys' fees related to title issues.[23] According to Stevens, even if title issues are resolved in favor of TCMLD, TCMLD has no additional funds to pay the remaining balance of the $1.7 million purchase price for Lot 5.[24] Stevens agreed to provide documentation to at least one investor showing that the investment is a loss for tax purposes.[25]

2. Fraud Related to TCMLD Investment.

The PPM for the TCMLD offering stated that Stevens was one of the managers upon which the success of TCMLD was dependent, stating that Stevens was the "Principal" with a long successful history in real estate.[26] As of the date the investments were being offered in TCMLD, Stevens had multiple federal tax liens recorded against him in Florida totaling over $100,000.[27] The existence of the tax liens were not disclosed to investors in the investment documents, nor were investors told about them in any other way.[28]

The TCMLD investment documents also stated that the success of TCMLD was "dependent on the services and expertise of existing management," listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in

[21] HT Vol. VI, p. 697, lns. 5-7; HT Vol. VII, p. 848, ln. 19 – p. 849, ln. 1.
[22] HT Vol. I, p. 132, lns. 6-8; HT Vol. IV, p. 466, lns. 4-17; HT Vol. VI, p. 697, lns. 2-4, p, 698, lns. 3-24.
[23] HT Vol. VI, p. 698, lns. 3-24; HT Vol. VII, p. 807, ln. 23 – p. 808, ln. 1, p. 814, lns. 16-22, p. 821, ln. 20 – p. 822, ln. 19, p. 826, lns. 10-23, p. 828, ln. 23 – p. 830, ln. 4., p. 839, ln. 19 – p. 840, ln. 8, p. 843, lns. 13-21.
[24] HT Vol. VII, p. 828, ln. 23 – p. 830, ln. 10, p. 843, lns. 13-21, p. 844, ln. 22 – p. 845, ln. 2.
[25] Ex. S-117; HT Vol. IV, p. 701, ln. 3 – p. 702, ln. 4.
[26] *See e.g.* Ex. S-107 at ACC000160.
[27] Exs. S-244-245; HT Vol I, p. 55, ln. 9 – p. 56, ln. 24.
[28] Exs. S-52 – S-94, S-104 – S-105, S-107 – S-109, S-111 – S-113, S-253; HT Vol. IV, p. 465, ln. 23- p. 466, ln. 1.

psychology."[29] In fact, Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[30]

TCMLD also represented to investors in the PPM that investor's notes are "Secured Promissory Notes" and "are secured by the land Tri-Core Mexico Land Development, LLC purchases."[31] At least three investors were told that the investment was "safe" due to the security that was pledged.[32] First, and undisclosed to investors, an American entity cannot directly own the ocean-front Mexican property at issue; it must be held in a bank trust or a Mexican corporation.[33] Investors were advised before investing that TCMLD had entered into a contract to purchase Lot 5, the subject investment property.[34] In fact, TCMLD has never purchased Lot 5, or any other Mexican real estate with investor funds, and has not securitized its investors in any way.[35]

Not only has TCMLD never owned Lot 5, it has never had a contract to purchase Lot 5. Although Respondents failed to produce the purchase contract at hearing, Stevens testified that the purchaser on the contract was *Sylvia Torres*, not TCMLD, and that the legality of that contract has been at issue since 2007 and is purportedly being litigated in the Mexican courts.[36]

Despite knowledge of the title issue in 2007, TCMLD solicited investors for Lot 5 in 2008, with no mention of the title issue with Lot 5 in the offering materials.[37] Further, and undisclosed to investors, one of the five parcels of Lot 5, Parcel 5, was promised to TCBD as compensation.[38]

Finally, the TCMLD PPM advised investors that the investment was "being sold by officers and directors of the Company [TCMLD], who will not receive any compensation for their

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[29] *See e.g.* Ex. S-128 at TRI_C007637.
[30] Ex. S-218; HT Vol I, p. 51, ln. 3 – p. 55, ln. 5.
[31] *See e.g.* Ex. S-107 at ACC000154, 000164; HT Vol. VI, p. 692, lns. 1 - 7.
[32] Exs. S-104, S-109 at ACC010581; HT Vol. IV, p. 480, ln. 22 – p. 481, ln. 8; HT Vol. VI, p. 688, ln. 24 – p. 689, ln. 6, p. 689, ln. 19 – p. 690, ln. 19, p. 692, lns. 8-19.
[33] Ex. R-14; HT Vol. VII, p. 833, ln. 19 – p. 835, ln. 7; H.T. Vol. VIII, p. 898, ln. 21 – p. 900, ln. 25, p. 990, lns. 3-25.
[34] Exs. S-104 at ACC004740, S-109 at ACC010549; HT Vol. I, p. 132, lns. 6-24; HT Vol. IV, p. 479, ln. 13 – p. 480, ln. 10.
[35] HT Vol. IV, p. 466, lns. 18-22; HT Vol. VI, p. 696, ln. 20 – p. 697, ln. 4; HT Vol. VII, p. 833, lns. 15-18, p. 835, ln. 13 – p. 837, ln. 13.
[36] HT Vol. VII, p. 807, ln. 23 – p. 808, ln. 1, p. 814, lns. 16-22, p. 821, ln. 20 – p. 822, ln. 19, p. 826, lns. 10-23.
[37] Exs. S-52 – S-60, S-64 – S-68, S-70 – S-73, S-76, S-80 – S-81, S-83, S-85, S-89 – S-91, S-93 – S-94, S-107, S-112 – S-113, S-219.
[38] HT Vol. VII, p. 804, lns. 3-10, p. 845, lns. 3-22.

efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[39] In fact, investors were solicited by and sold investments in TCMLD through individuals that were not officers or directors of TCMLD, nor were they members of NASD (FINRA) or registered as a dealer or salesman in Arizona, and yet received commissions.[40] One of these unregistered salesmen, Brian Buckley, received sales fees/commissions for over 30 investors he solicited to invest in the TCMLD offering.[41]

B. TCC 2/08 Investment – Lot 5

1. The TCC 2/08 Offering – Lot 5.

TCC is a limited liability company organized in Arizona in August 2007.[42] Although originally organized as a member-managed company, TCC was changed to a manager-managed company in October 2007, with Mogler as the manager.[43] During all relevant periods, Mogler was a signatory on TCC bank accounts.[44]

TCC issued a PPM dated February 1, 2008 offering notes to investors at an 80% rate of return, compounded annually, with a maturity date for payment of both interest and principal 24 months from the date of commencement of each note.[45] The total offering was not to exceed $3,500,000. During all relevant periods, TCC was not registered with the Commission as a dealer, nor was this offering.[46] In addition to the PPM, investors executed and received a subscription agreement and note issued by TCC, and were provided with TCC's business plan (hereafter collectively "TCC 2/08 investment documents"). Mogler was one of the signatories for TCC on

[39] *See e.g.* Ex. S-107 at ACC000165.
[40] Exs. S-1(j), S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[41] Exs. S-1(j), S-125, S-250.
[42] Ex. S-2(a).
[43] Ex. S-2(b).
[44] Ex. S-13 at ACC006340-6351.
[45] Exs. S-128 – S-129, S-132 – S-136.
[46] Ex. S-1(a).

the 2/08 investment documents.[47] The TCC 2/08 investment documents stated that "use of the proceeds is to purchase a water front subdivision in San Luis Rio Colorado, Sonora, Mexico".[48] Investors were advised both in writing and orally that investment property was Mexican real estate known as "Lot 5".[49] The TCC business plan provided to investors states, "The Company [TCC] has acquired the 250-acre plus Lot 5 land parcel . . ."[50] "Lot 5" that is referenced in the TCC 2/08 investment is the same property description provided to investors in the TCMLD investment.[51]

According to documents produced by TCC, at least seven investors invested in the TCC 3/08 investment, with $335,000 raised from investors in or from Arizona.[52] Out of state residents that invested in the TCC 2/08 investment either returned their investment documents and funds to Arizona or were solicited by phone or email from Arizona.[53] Note holders had no managerial rights or powers.[54] There is no evidence that TCC 2/08 investors have been repaid in any way, despite the fact that the two year term of the notes has long-passed.[55] Due to title issues with Lot 5, the property has not been purchased and TCC's representative testified at hearing that he did not know what happened to TCC 2/08 investor funds.[56]

2. Fraud Related to the TCC 2/08 Investment.

The TCC 2/08 investment documents advised investors that it was offering "Secured Promissory Notes."[57] The investment documents also stated the "Notes being offered by the Company in this Private Placement Offering are secured by the land Tri-Core Companies, LLC purchases" and the accompanying business plan stated, "[t]he Company [TCC] has acquired the 250-acre plus Lot 5 land parcel . . ."[58] First, and undisclosed to investors, TCC could never

[47] Exs. S-128 – S-129, S-132 – S-136.
[48] *See e.g.* Ex. S-128 at TRI_C007636.
[49] Exs. S-128 – S-129, S-132 – S-136; HT Vol. IV, p. 493, lns. 4 – p. 495, ln.6.
[50] *See e.g.* Ex. S-128 at TRI_C007677.
[51] HT Vol. I, p. 134, ln. 22 – p. 135, ln. 15.
[52] Exs. S-30, S-32 at ACC004716, S-50, S-128 – S-129, S-132 – S-138, S-140, S-220; HT Vol. I, p. 127, ln. 4 – p. 129, ln. 23, p. 135, ln. 24 – p. 144, ln. 7.
[53] HT Vol. I, p. 49, ln. 3-12; HT Vol. IV, p. 462, ln. 2 – p. 465, ln. 10, p. 468, ln. 25 – p. 469, ln. 10.
[54] *See e.g.* Ex. S-128 at TCC_C007645.
[55] HT Vol. IV, p. 848, lns. 19-21, p. 516, lns. 10 – 17.
[56] HT Vol. IX, p. 1062, ln. 23 – p. 1063, ln. 10.
[57] *See e.g.* Ex. S-128 at TRI_C007631.
[58] *See e.g.* Ex. S-128 at TRI_C007641, 7677.

directly own the ocean-front Mexican property at issue; it must be held in a bank trust or a Mexican corporation.[59]

Second, Lot 5 referenced as collateral in the TCC 2/08 investment is the same property description provided to investors in the TCMLD investment, and the TCMLD offering pledging the same security to investors was not disclosed to TCC investors.[60]

Third, title to Lot 5 has never been held by TCC, nor have investors received any proof of ownership or security for their investments (see Section III(A), above).[61] In fact, at the time these investments were offered and sold by TCC, the rights under a purchase contract for Lot 5 were in dispute, and continue to be in dispute, yet this information appears nowhere in the offering materials.[62] Further, although TCC's representative testified that the PPM should have only offered an investment collateralized by *a portion* of Lot 5 – Parcel 5 of Lot 5 – instead of the entire 250 acre lot, TCC still had no rights to Parcel 5 because, at most, it had been pledged to TCBD, not TCC.[63]

Fourth, although investors were advised their funds would be used to purchase Lot 5, TCC's representative admitted that Lot 5 has not been purchased due to title issues, and thus investor funds were not used for any land purchase. In fact, he could not identify how investor funds in the TCC 2/08 investment were used.[64]

Fifth, the TCC 2/08 investment documents also stated that the success of TCC was "dependent on the services and expertise of existing management." The PPM listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in

[59] Ex. R-14; HT Vol. VII, p. 833, ln. 19 – p. 835, ln. 7; H.T. Vol. VIII, p. 898, ln. 21 – p. 900, ln. 25, p. 990, lns. 3-25.
[60] Exs. S-128 – S-129, S-132 – S-136; HT Vol. I, p. 134, ln. 22 – p. 135, ln. 15; HT Vol. IV, p. 497, lns. 11-14, p. 509, ln. 21 – p. 510, ln. 5.
[61] HT Vol. I, p. 132, lns. 6-24; HT Vol. IV, p. 497, lns. 2-10, p. 500, lns. 5-7, p. 510, ln. 19 – p. 511, ln. 14, p. 522, lns. 6-17; HT Vol. IX, p. 1060, ln. 20 – p. 1061, ln. 2.
[62] Exs. S-128 – S-129, S-132 – S-136; HT Vol. VII, p. 807, ln. 23 – p. 808, ln. 1, p. 814, lns. 16-22, p. 821, ln. 20 – p. 822, ln. 19, p. 826, lns. 10-23.
[63] *See e.g.* Ex. S-128 at TRI_C007677; HT Vol. VII, p. 804, lns. 4-10, p. 845, lns. 3-14; HT Vol. IX, p. 1061, lns. 3-10.
[64] HT Vol. IX, p. 1062, ln. 23 – p. 1063, ln. 10.

psychology."[65] In fact, Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[66]

Finally, the TCC 2/08 investment PPM advised investors that the investment was "being sold by the officers and directors of the Company [TCC], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[67] Brian Buckley, who also received sales fees/commissions for numerous TCMLD Lot 5 investors, received sales fees/commissions for all but one of the TCC 2/08 Lot 5 investors at issue.[68] Mr. Buckley was not an officer or director of TCC, a member of NASD (FINRA) or registered as a dealer or salesman in Arizona.[69] TCC's representative admitted at hearing that he had no idea if the salespeople selling the TCC investments were registered with FINRA or in Arizona.[70]

C. TCC 3/08 Investment – Lot 47

1. The TCC 3/08 Offering – Lot 47.

TCC issued another PPM dated March 1, 2008 offering notes to investors at a 60% rate of return, compounded annually, with a maturity date for payment of both interest and principal 24 months from the date of commencement of each note. The total offering was not to exceed $4,500,000. Again, TCC was not registered with the Commission as a dealer, nor was this offering.[71] In addition to the PPM, investors executed and received a subscription agreement and note issued by TCC, and were provided with TCC's business plan (hereafter collectively "TCC

[65] *See e.g.* Ex. S-128 at TRI_C007637.
[66] Ex. S-218; HT Vol I, p. 51, ln. 3 – p. 55, ln. 5.
[67] *See e.g.* Ex. S-128 at TRI_C007642.
[68] Exs. S-150, S-250.
[69] Exs. S-1(j), S-150, S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[70] HT Vol. IX, p. 1073, lns. 7-17.
[71] Ex. S-1(a).

3/08 investment documents").[72] Mogler was one of the signatories for TCC on the TCC 3/08 investment documents.[73] The TCC 2/08 investment documents stated that "use of the proceeds is to purchase and develop a water front parcel in San Luis Rio Colorado, Sonora, Mexico as described herein".[74] Investors were advised both orally and in writing in the accompanying business plan that investment property was Mexican real estate known as "Lot 47" or "Relaxante".[75]

According to documents produced by TCC, TCC's 3/08 Lot 47 investment had over thirty investors, and raised a total of $1,400,000.[76] Over twenty-five of those investors were offered and sold the investments in or from Arizona, totaling approximately $1,158,000 of the total invested.[77] Out of state residents that invested in the TCC 3/08 investment either returned their investment documents and funds to Arizona, traveled to Arizona and were directly solicited in Arizona, or were solicited by phone, mail, or email from Arizona.[78] Note holders had no managerial rights or powers.[79] There is no evidence that TCC 3/08 investors have been repaid in any way, despite the fact that the two year notes were issued in 2008, 2009, and 2010.[80]

Oddly, despite the fact that only $1,400,000 was raised from investors for Lot 47, minus at least $33,000 in commissions and unknown amounts for marketing and administration expenses from Lot 47 investor funds,[81] TCC's representative testified that TCC paid TCBD $1,500,000 for

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[72] Exs. S-141 – S-151, S-153 – S-166, S-172, S-221.
[73] Exs. S-141 – S-151, S-153 – S-166, S-172.
[74] *See e.g.* Ex. S-149 at TRI_C005965.
[75] *See e.g.* Ex. S-149 at TRI_C006009; HT Vol. V, p. 559, ln. 23 – p. 560, ln. 8, p. 572, ln. 23 – p. 573, ln. 9, p. 638, lns. 10-22.
[76] Exs. S-44, S-141 – S-151, S-153 – S-166, S-172, S-221; HT Vol. I, p. 152, ln. 11 – p. 153, ln. 9, p. 154, ln. 24 – p. 156, ln. 3.
[77] Exs. S-141 – S-151, S-153 – S-166, S-172, S-221; HT Vol. I, p. 170, ln. 6 – p. 171, ln.25, p. 179, ln. 21– p. 186, ln. 3.
[78] Exs. S-170 – S-171; HT Vol. I, p. 170, lns. 16 – p. 171, ln. 17, p. 172, ln. 22 – p. 173, lns. 22-25; p. 175, lns. 16-22, p. 179, lns. 17-20, p. 181, ln. 4 – p. 183, ln. 22, p. 184, ln. 5 – p. 185, ln. 10; HT Vol. V, p. 555, ln. 3 – p. 556, ln. 6, p. 560, lns. 9-14, p. 570, ln. 5 – p. 571, ln. 7, p. 573, lns. 10-21.
[79] *See e.g.* Ex. S-149 at TRI_C005975.
[80] Exs. S-152, S-179, S-221; HT Vol. V, p. 561, lns. 15-23, p. 564, ln. 18 – p. 565, ln. 5, p. 576, ln. 3 – p. 577, ln. 25, p. 581, ln. 16 – p. 582, ln. 15, p. 639, ln. 19 – p. 642, ln. 1, p. 643, ln. 8 – p. 645, ln. 18.
[81] Exs. S-44, S-182 – S-183, S-221, S-250; HT Vol. I, p. 150, ln. 11 – p. 151, ln. 21; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14, p. 546, lns. 2-20; HT Vol. VIII, p. 1016, ln. 9 – p. 1017, ln. 3, p. 1021, ln. 2 - p. 1022, ln. 1.

Lot 47, but could not identify where the extra funds were generated to pay the full purchase price.[82]

2. Fraud Related to the TCC 3/08 Investment.

The TCC 3/08 investment documents advised investors that TCC was offering "Secured Promissory Notes."[83] The investment documents also stated, "[t]he Notes being offered by the Company in this Private Placement Offering are secured by the land Tri-Core Companies LLC purchases" and identified the property in the accompanying business plan as, "Lot 47" or "Relaxante."[84] Mogler and others further represented in public broadcasts during the time the TCC 3/08 investment was offered that investments in Mexican land were "safe" because they were secured by land and that investors were in a "first lien position".[85]

Undisclosed to investors, Lot 47 could not be held by TCC in Mexico due to Mexican laws. TCC's representative admitted that the TCC 3/08 investment documents advised investors that TCC would own Lot 47, which was something that could not legally happen in Mexico.[86] As a result, investors have not been provided proof that TCC purchased Lot 47,[87] or proof that they hold any security in Lot 47.[88]

In fact, the only title document that was produced to the Division concerning Lot 47 was produced by Mogler. That document was a Sales Agreement for Lot 47 with the purchaser identified as "Phoenix Premium Developers, Sociedad De Responsabilidad Limitada De Capital Variable".[89] TCC's representative confirmed at hearing that Lot 47 is held by Phoenix Premium Developers, an S. de R.L. (Mexican corporation), and admitted that the land could not be held in fee simple title by an American entity.[90] Further, although TCC's representative admitted that

[82] HT Vol. VIII, p. 920, lns. 13-21, p. 1003, lns. 1-12, p. 1022, ln. 2 – p. 1023, ln. 9.
[83] *See e.g.* Ex. S-149 at TRI_C005961.
[84] *See e.g.* Ex. S-149 at TRI_C005971, 6009-10.
[85] Exs. S-21, S-23, S-26, S-227, S-229, S-255(a) & (b); HT Vol. II, p. 207, ln. 9 – p. 208, ln. 10, p. 209, ln. 25 – p. 212, ln. 4, p. 224, ln. 21 – p. 229, ln, 21, p. 231, ln. 25 – p. 232, ln. 23; HT Vol. IV, p. 408, ln. 22 – p. 413, ln. 15, p. 416, ln. 22 – p. 424, ln.22, p. 426, ln. 14 – p. 438, ln. 10; HT Vol. V. p. 535, ln. 23 – p. 536, ln. 5.
[86] HT Vol. VIII, p. 1004, ln. 20 – p. 1005, ln. 3.
[87] Ex. S-45(a); HT Vol. V, p. 561, lns. 6-9, p. 574, ln. 13 – p. 575, ln. 18, p. 639, lns. 11-14.
[88] HT Vol. I, p. 186, ln. 13 – p. 187, ln. 7; HT Vol. V, p. 561, lns. 10-14, p. 575, lns. 19-23, p. 639, lns. 15-18.
[89] Exs. S-45(a), S-45(b); HT Vol. I, p. 159, ln. 19 – p. 165, ln. 2.
[90] Ex. R-14; HT Vol. VIII, p. 900, ln. 4 – p. 907, ln. 19, p. 928, lns. 10-21, p. 990, lns. 9-11.

there is a mechanism in Mexico to secure the TCC 3/08 investors with Lot 47, he also admitted that TCC 3/08 investors are not securitized by Lot 47 because it would cost approximately $25,000 that TCC does not have.[91]

The TCC 3/08 investment documents also stated that the success of TCC was "dependent on the services and expertise of existing management." The PPM listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[92] In fact, Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[93]

Additionally, the TCC 3/08 investment PPM advised investors that the investment was "being sold by the officers and directors of the Company [TCC], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[94] Brian Buckley received sales fees/commissions for the majority of the TCC 3/08 Lot 47 investors at issue, totaling approximately $30,000.[95] Mr. Buckley was not an officer or director or TCC, a member of NASD (FINRA) or registered as a dealer or salesman in Arizona.[96] Further, Kathleen Randolph also received sales fees/commissions for bringing in at least one Lot 47 investor, yet she was not an officer or director of TCC, a member of NASD (FINRA) or registered as a dealer or salesman in Arizona.[97]

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[91] HT Vol. VIII, p. 1008, ln. 16 – p. 1011, ln. 15, p. 1035, lns. 6-8.
[92] *See e.g.* Ex. S-149 at TRI_C005966.
[93] Ex. S-218; HT Vol. I, p. 51, ln. 3 – p. 55, ln. 5.
[94] *See e.g.* Ex. S-149 at TRI_C005972.
[95] Exs. S-44, S-125, S-221, S-250.
[96] Exs. S-1(j), S-150, S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[97] Exs. S-1(n), S-182, S-183; HT Vol. V, p. 546, lns. 2-20.

Finally, Mogler retained an accounting expert to analyze use of investor funds from 2009 – 2011, and prepared a report regarding the same.[98] The accounting expert specifically relied on Mogler when categorizing expenses for his report.[99] The TCC 3/08 offering includes investors that invested in 2009 – 2010,[100] and the accounting expert testified that Mogler identified relevant investors for the report.[101] Not only did Mr. Buckley and Ms. Randolph receive sales fees/commissions for bringing in investors, but Mogler's accounting expert's report indicates that Casimer Polancheck and his entities, as identified by Mr. Hinkeldey, received approximately hundreds of thousands of dollars from investor funds for referral fees between 2009 – 2011.[102] Neither Polanchek nor his entities were officers or directors of TCC, a member of NASD (FINRA) or registered as dealers or salesmen in Arizona.[103]

Finally, between 2009 – 2010, Mogler used approximately $345,000 of investor funds, which include investor funds from the TCC 3/08 offering, for personal use that was not disclosed to investors.[104]

D. TCC 6/10 Investment – Mexican Land

1. The TCC 6/10 Offering – Mexican Land.

TCC issued yet another PPM dated June 1, 2010 offering notes to investors at a 40% rate of return, compounded annually, with a maturity date for payment of both interest and principal 24 months from the date of commencement of each note. The total offering was not to exceed $5,500,000. Neither TCC nor this offering was registered with the Commission.[105] In addition to the PPM, investors executed and received a subscription agreement and note issued by TCC, and were provided with TCC's business plan (hereafter collectively "TCC 6/10 investment

[98] Exs. S-256 at pp. 10-12, 14-17, 53-54; S-258 – S-259.
[99] Ex. S-256 at pp. 19, 41, 45-47, 53-54.
[100] Exs. S-44, S-221.
[101] Ex. S-256 at pp. 39-40.
[102] Exs. S-256 at pp. 44-45, S-258 – S-259 at fn. 15& Exhibit 1-M; HT Vol. IX, p. 1073, ln. 18 – p. 1074, ln. 14.
[103] Exs. S-1(g), (h) & (k), S-2(a) & (b).
[104] Exs. S-256 at pp. 45-47, 53-54, S-258 – S-259.
[105] Ex. S-1(a).

documents").[106] Mogler was a signatory for TCC on the TCC 6/10 investment documents.[107] The TCC 6/10 investment documents stated that "use of the proceeds is to purchase parcels of land along the Sonoran Coast of Mexico."[108] Although the subject parcel(s) were not specifically identified to investors in the investment documents at the time of investing, TCC identified for the first time at hearing, via its representative, that the subject property is known as "Lot 3".[109]

TCC produced an investor list for TCC's 6/10 offering listing over forty investors, and showing a total of approximately $1.285 million raised from investors.[110] However, the list omitted at least two investors that invested an additional $200,000.[111] Thus, the total investor funds raised for the TCC 6/10 offering was at least $1.485 million. At least seven investors were offered and sold the investments in or from Arizona, totaling $370,000 of the total invested.[112] Note holders had no managerial rights or powers.[113]

TCC claims that Lot 3 was purchased with investor funds from the TCC 6/10 investment.[114] However, the TCC 6/10 investment documents state that the cost for the land purchase is $4.495 million,[115] and TCC's representative testified that the purchase price for Lot 3 was $3.6 million.[116] It is unclear how investor funds totaling less than $1.5 million funded this land purchase. Tellingly, TCC was unable to produce any documents at hearing to verify the purchase of Lot 3.[117] TCC's representative was also unable to give any reason why the land had not been transferred to TCC and was still being held by a third party.[118]

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[106] Exs. S-184 – S-189, S-236.
[107] Exs. S-184 – S-189, S-236.
[108] *See e.g.* Ex. S-187 at TRI_C003273.
[109] HT Vol. VIII, p. 944, lns. 19-21.
[110] Ex. S-47; HT Vol. II, p. 237, ln. 15 – p. 238, ln. 9.
[111] Exs. S-47, S-189, S-222, S-236; HT Vol. II, p. 239, ln. 10 – p. 241, ln. 10.
[112] Exs. S-184 – S-189, S-222, S-236; HT Vol. II, p. 234, ln. 11 – p. 235, ln. 17, p. 237, ln. 15 – p. 238, ln. 15, p. 243, ln. 16 – p. 244, ln. 21.
[113] *See e.g.* Ex. S-187 at TRI_C003283.
[114] HT Vol. VIII, p. 1030, ln. 21 – p. 1031, ln. 1.
[115] *See e.g.* Ex. S-187 at TCC_003280.
[116] HT Vol. VIII, p. 1035, lns. 17-21.
[117] HT Vol. VIII, p. 1035, lns. 11-16.
[118] HT Vol. VIII, p. 1031, lns. 12-17.

There is no evidence that TCC 6/10 investors have been repaid in any way, despite the fact that the two year notes have all expired.[119]

2. Fraud Related to the TCC 6/10 Investment.

The TCC 6/10 investment documents advised investors that it was offering "Secured Promissory Notes" and that "[t]he Notes being offered by the Company in this Private Placement Offering are secured by the land Tri-Core Companies LLC purchases".[120] Investors were also orally advised their investment would be securitized by Mexican land.[121] Mogler further represented in a public broadcast during the time the TCC 6/10 investment was offered that investments in Mexican land were "safe" because they are secured by land.[122] Investors have never been provided any proof that their investment funds were used to purchase land in Mexico, and TCC failed to produce any title documents at hearing.[123] In fact, TCC's representative testified that Lot 3 "is in the process of being titled."[124] TCC's representative admitted that as of the date of hearing, Sylvia Torres owns Lot 3, not TCC, and could not explain why title had not been transferred from Ms. Torres.[125]

Second, even assuming the purchase is completed, TCC's representative admitted at hearing that due to Mexican law, title to a Mexican parcel such as Lot 3 cannot be held in fee simple by TCC and has to be owned by an S. de R.L. (Mexican corporation) or a Mexican national.[126] TCC's attorney also advised TCC that Mexican land can be owned by a Mexican bank/land trust.[127]

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[119] HT Vol. V, p. 590, ln. 22 – p. 591, ln. 6; HT Vol. VI, p. 682, lns. 14-16.
[120] *See e.g.* Ex. S-187 at TCC_003269, 3279.
[121] *See e.g.* HT Vol. VI, p. 676, ln. 23 – p. 677, ln. 1.
[122] Exs. S-21, S-23, S-26, S-227, S-255(b); HT Vol. II, p. 207, ln. 9 – p. 208, ln. 10, p. 209, ln. 25 – p. 212, ln. 4, p. 224, ln. 21 – p. 229, ln, 21; HT Vol. IV, p. 408, ln. 22 – p. 413, ln. 15, p. 426, ln. 14 – p. 438, ln. 10; HT Vol. V. p. 535, ln. 23 – p. 536, ln. 5.
[123] HT Vol. V, p. 590, lns. 19-21; HT Vol. VI, p. 681, lns. 11-14; HT Vol. VIII, p. 1035, lns. 11-16.
[124] HT Vol. VIII, p. 944, lns. 19-23.
[125] HT Vol. VIII, p. 1031, lns. 5-8, 12-17.
[126] HT Vol. VIII, p. 900, lns. 4-25, p. 990, lns. 9-11.
[127] Ex. R-14.

Third, investors have been provided no proof that their investment is securitized with any Mexican land as promised in the investment documents.[128] Again assuming the purchase of Lot 3 is completed, TCC's representative has admitted that securitizing investors with property in Mexico is costly, and that TCC has no cash to securitize investors.[129]

Fourth, the TCC 6/10 investment documents also stated that the success of TCC was "dependent on the services and expertise of existing management." The PPM listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[130] In fact, Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[131]

Finally, the TCC 6/10 investment PPM advised investors that the investment was "being sold by the officers and directors of the Company [TCC], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[132] Brian Buckley received sales fees/commissions for numerous TCC 6/10 investors,[133] yet Mr. Buckley was not an officer or director of TCC, a member of NASD (FINRA) or registered as a dealer or salesman in Arizona.[134]

Mogler's accounting expert analyzed use of investor funds from 2009 – 2011, and prepared a report regarding the same.[135] The 6/10 TCC offering includes investors that invested in 2010 – 2011,[136] and the accounting expert testified that Mogler identified relevant investors for the

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[128] HT Vol. II, p. 245, lns. 6-15; HT Vol. V, p. 590, lns. 7-18; HT Vol. VI, p. 681, ln. 23 – p. 682, ln. 1.
[129] HT Vol. VIII, p. 1009, ln. 16 – p. 1011, ln. 15; HT Vol. IX, p. 1104, lns. 13-18.
[130] *See e.g.* Ex. S-187 at TRI_C003274.
[131] Ex. S-218; HT Vol. I, p. 51, ln. 3 – p. 55, ln. 5.
[132] *See e.g.* Ex. S-187 at TRI_C003280.
[133] Exs. S-47, S-222, S-250.
[134] Exs. S-1(j), S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[135] Exs. S-256 at pp. 10-12, 14-17, 53-54, S-258 – S-259.
[136] Exs. S-47, S-222.

report.[137] Not only did Mr. Buckley receive sales fees/commissions for bringing in investors, but Mogler's accounting expert's report indicates that Casimer Polancheck and his entities, as identified by Mr. Hinkeldey, received approximately hundreds of thousands of dollars from investor funds for referral fees between 2009 – 2011.[138] Neither Polanchek nor his entities were officers or directors of TCC, a member of NASD (FINRA) or registered as dealers or salesmen in Arizona.[139]

Finally, between 2010 – 2011, Mogler used approximately $445,000 of investor funds, which include investor funds from the TCC 6/10 offering, for personal use that was not disclosed to investors.[140]

E. ERCC Investment – Recycling

1. ERCC Recycling Offering.

ERCC issued a PPM dated August 8, 2011 offering notes to investors at a 24% rate of return with a maturity date for payment of principal 24 months from the date of commencement of each note. Interest was deferred for 90 days, then added to the principal balance, and interest payments were to be paid on the combined amount starting the fourth month.[141] The total offering was not to exceed $1,500,000. In addition to the PPM, investors executed and received a subscription agreement and note issued by ERCC (hereafter collectively "ERCC investment documents").[142] The ERCC investment documents stated ERCC was a new division of "ERC", was in the business of recycling, and that "use of the proceeds is to purchase compactor equipment to be installed at commercial locations (SEE 'USE OF PROCEEDS')."[143] Mogler was a signatory

[137] Ex. S-256 at pp. 39-40.
[138] Exs. S-256 at pp. 44-45, S-258 – S-259 at fn. 15& Exhibit 1-M; HT Vol. IX, p. 1073, ln. 18 – p. 1074, ln. 14.
[139] Exs. S-1(g), (h) & (k), S-2(a) & (b).
[140] Exs. S-256 at pp. 45-47, 53-54, S-258 – S-259.
[141] Exs. S-190 – S-196, S-198 – S-201, S-207, S-235.
[142] Exs. S-190 – S-196, S-198 – S-201, S-207, S-235.
[143] *See e.g.* Ex. S-191 at ERCC_000309.

on behalf of ERCC on the investment documents.[144] Neither ERCC nor the ERCC offering was registered with the Commission.[145]

During the relevant time period, ERCC was a manager-managed limited liability company organized in Arizona in August 2011. During the relevant period, Mogler was the manager of ERCC, and Jim Hinkeldey was a member.[146] Mogler was the sole signatory on the ERCC bank accounts during the relevant time period.[147]

ERCC produced an investor list for ERCC's offering listing approximately 30 investors, and showing a total of approximately $1.214 million raised from investors.[148] However, the list omitted at least three investors that invested an additional $455,000.[149] Thus, the total investor funds raised for the ERCC offering was at least $1.669 million, well over the maximum offering amount represented to investors. Ten investors were offered and sold the investments in or from Arizona in 2011, totaling $880,000 of the total invested.[150] Note holders had no managerial rights or powers.[151]

Despite Mr. Hinkeldey's assertion that ERCC has been successful, he could not articulate why investors had not been repaid.[152] Although some investor payments have been made to three investors totaling $47,477, no payments to investors have been made since November 2012 for one investor, and March 2013 for the other two, despite significant balances on the notes.[153]

2. Fraud Related to the ERCC Investment.

First, the ERCC investment documents state that ERCC was offering "secured Promissory Notes" and that the notes "will be secured by the equipment/compactors purchased."[154] ERCC

[144] Exs. S-194 – S-196, S-198 – S-199, S-207.
[145] Ex. S-1(d).
[146] Ex. S-5(a).
[147] Ex. S-13 at ACC006357-60.
[148] Exs. S-28, S-32 at ACC004718, S-38; HT Vol. II, p. 287, ln. 7 – p. 289, ln. 21, p. 293, lns. 12-21.
[149] Exs. S-194 – S-196, S-198 – S-199, S-207; HT Vol. II, p. 294, ln. 12 – p. 300, ln 17.
[150] Exs. S-190 – S-196, S-198 – S-201, S-207, S-223, S-235; HT Vol. II, p. 294, lns. 9-20; HT Vol. V, p. 604, ln. 13 – p. 606, ln.13.
[151] *See e.g.* S-191 at ERCC_000318.
[152] HT Vol. IX, p. 1110, ln. 9 – p. 1111, ln. 9.
[153] Exs. S-223, S-238, S-243, S-248; HT Vol. II, p. 306, ln. 21 – p. 307, ln. 24, p. 310, lns. 1-20, p. 311, ln. 22 – p. 312, ln. 16.
[154] *See e.g.* S-191 at ERCC_000305, 314.

provided no proof at hearing as to what happened with investor funds, and provided no proof that any equipment had been purchased as the ERCC investment documents promised. Investors have been provided no proof that equipment was purchased by ERCC, nor any mechanism to securitize their investments.[155]

Second, at least one investor that ERCC admits is an ERCC offering investor was issued a PPM issued by "ERC Compactors **Nevada**, LLC", identified as an Arizona limited liability company.[156] This investor's investment documents are nearly identical to the ERCC offering documents with the exception of the issuer.[157] Mogler signed this investor's investment documents, including the promissory note, on behalf of "ERC Compactors **Nevada**, LLC".[158] However, no entity under the name of "ERC Compactors **Nevada**, LLC" exists or has existed in Arizona.[159]

Third, the ERCC investment documents also stated that the success of ERCC was "dependent on the services and expertise of existing management." The PPM listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[160] In fact, Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[161]

Finally, the ERCC investment documents advised investors that the investment was "being sold by the officers and directors of the Company [ERCC], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive

[155] HT Vol. V, p. 601, lns. 2-24.
[156] Exs. S-38, S-200, S-235, S-238; HT Vol. II, p. 301, ln. 7 – p. 305, ln.12, p. 306, ln. 21 – p. 307, ln. 24.
[157] HT Vol. II, p. 305, lns. 19-25.
[158] Ex. S-235.
[159] Ex. S-239; HT Vol. II, p. 306, lns. 1-13.
[160] *See e.g.* Ex. S-191 at ERC_C000310.
[161] Ex. S-218; HT Vol. I, p. 51, ln. 3 – p. 55, ln. 5.

commissions up to ten percent (10%) of the price of the Notes sold."[162] Brian Buckley received commissions for numerous ERCC investors,[163] yet Mr. Buckley was not an officer or director of ERCC, a member of NASD (FINRA) or registered as a dealer or salesman in Arizona.[164]

Mogler's accounting expert analyzed use of investor funds from 2009 – 2011, and prepared a report regarding the same.[165] The ERCC offering includes investors that invested in 2011,[166] and the accounting expert testified that Mogler identified relevant investors for the report.[167] Not only did Mr. Buckley receive sales fees/commissions for bringing in investors, but Mogler's accounting expert's report indicates that Casimer Polancheck and his entities, as identified by Mr. Hinkeldey, received approximately hundreds of thousands of dollars from investor funds for referral fees between 2009 – 2011.[168] Neither Polanchek nor his entities were officers or directors of ERCC, a member of NASD (FINRA) or registered as dealer or salesmen in Arizona.[169]

Finally, in 2011, Mogler used approximately $180,000 of investor funds, including ERCC investor funds, for personal use that was not disclosed to investors.[170]

F. C&D Investment – Recycling

1. C&D Recycling Offering.

C&D issued a PPM dated October 1, 2010 offering notes to investors at a 24% rate of return with a maturity date for payment of principal 24 months from the date of commencement of each note. Interest was payable monthly.[171] The total offering was not to exceed $1,500,000. In addition to the PPM, investors executed and received a subscription agreement and note issued by C&D (hereafter collectively "C&D investment documents").[172] The C&D investment documents

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[162] *See e.g.* Ex. S-191 at ERC_C000315.
[163] Exs. S-38, S-223, S-250.
[164] Exs. S-1(j), S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[165] Exs. S-256 at pp. 10-12, 14-17, 53-54, S-258 – S-259.
[166] Exs. S-38, S-223.
[167] Ex. S-256 at pp. 39-40.
[168] Exs. S-256 at pp. 44-45, S-258 – S-259 at fn. 15& Exhibit 1-M; HT Vol. IX, p. 1073, ln. 18 – p. 1074, ln. 14.
[169] Exs. S-1(g), (h) & (k), S-5(a).
[170] Exs. S-256 at pp. 45-47, 53-54, S-258 – S-259.
[171] Exs. S-197, S-205, S-206, S-208, S-210 – S-213, S-234.
[172] Exs. S-197, S-205, S-206, S-208, S-210 – S-213, S-234.

stated that C&D had been formed in Nevada in 2000, was in the business of rubbish and waste recycling, and that "use of the proceeds is to create the company structure for the purchase and start-up requirements for a recycling center located in Apex, Las Vegas, Nevada. This covers such items as site planning, legal, accounting, marketing plan, business plan, franchise development and all other steps needed in the formation of this company as described herein (see 'USE OF PROCEEDS')."[173] Mogler signed the C&D investment documents for Peter A. Salazar Jr. for C&D, pursuant to what was represented to investors as a "limited power of attorney".[174] Investors were advised that TCBD was acting as agent for C&D, directed investors to deliver their investment documents to TCBD in Scottsdale, Arizona, and to make their investment checks payable to TCBD.[175] During the relevant period, Mogler was a signatory on TCBD bank accounts.[176]

From 2009 to early 2012, which incorporates the dates that that investments were made in the C&D investment, Peter A. Salazar was listed as an officer of C&D.[177] TCBD, by Mogler, executed a Consultant Agreement with C&D in October 2010.[178] The Consultant Agreement appointed TCBD to perform various tasks for C&D, including preparing the C&D investment documents and acting as investor liaison for a fee of $1,500,000.[179] C&D, the C&D offering, TCBD, and Mogler have never been registered with the Commission.[180]

TCBD, through Mogler as custodian of records, produced an investor list for the C&D investment showing a total of nearly $1.5 million raised.[181] Of that amount, $735,000 was offered and sold in or from Arizona.[182] Less than $200,000 has been repaid to these investors.[183] Of the

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[173] *See e.g.* S-213 at ACC011094.
[174] Exs. S-197, S-205, S-206, S-208, S-210 – S-213, S-234.
[175] *See e.g.* Ex. S-213 at ACC011114-11115.
[176] Exs. S-17 at ACC003981-3994, 4405-4407, S-27 at p. 9.
[177] Ex. S-7.
[178] Ex. S-216.
[179] Ex. S-216 at ACC009590.
[180] Exs. S-1(c), (f) & (i).
[181] Exs. S-31, S-32 at ACC00004717, S-35; HT Vol. I, p. 62, ln. 15 – p. 64, ln. 24; HT Vol. II, p. 253, lns. 1-21.
[182] Ex. S-224; HT Vol. II, p. 253, ln. 25 – p. 276, ln. 13; HT Vol. V, p. 616, ln. 5 – 619, ln. 1, p. 653, lns. 11-23, p. 657, lns. 8-24.
[183] Exs. S-215, S-224, S-237, S-240, S-241, S-247, S-252.

investors paid, only interest payments have been made. One investor has not received payments since June 2011,[184] with the remaining investors not paid since late 2012.[185] Again, this is despite the fact that Mr. Hinkeldey represented at hearing that C&D was very successful.[186]

2. Fraud Related to the C&D Investment.

Investors were told orally and in writing that the C&D investment was secured by assets; specifically, the C&D investment documents stated that the notes were "secured Promissory Notes" and were secured by "real estate in Nevada and California. The investors are in 1st lien position and the properties are free and clear."[187] Via a radio program, Mogler publicly offered the recycling investment opportunity during the time that the C&D offering was offered and sold. Mogler promoted it as a "safe place to put [an investor's] money" and stated that "the investor is protected by assets" so that there is a "game plan that is spelled out . . . in terms of getting the investor back their capital."[188] In another broadcast promoting both the recycling and Mexican land investment opportunities, Mogler stated that these investments were a "good, safe investment" meaning that they were "secured by either land or it's land-backed security."[189] One investor that invested multiple times in the C&D investment confirmed he invested as a result of listening to the Investment Roadshow radio broadcast, and has "radio" as his referral source on the C&D investor list.[190]

Investors have not received any deeds of trust or securitizing mechanisms for their investments, and have not received proof that C&D owns any particular land in Nevada and California, much less free and clear.[191] In fact, Mr. Hinkeldey testified that Anthony Salazar was

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[184] Ex. S-252.
[185] Exs. S-215, S-237, S-240, S-241, S-247.
[186] HT Vol. IX, p. 1093, ln. 23 – p. 1094, ln. 24, p. 1110, ln. 9 – p. 1111, ln. 5.
[187] *See e.g.* Ex. S-213 at ACC011090, ACC011098, ACC011128; HT Vol. V, p. 651, lns. 1-15, p. 658, lns. 4-15.
[188] Exs. S-21, S-23, S-26, S-230, S-255(c); HT Vol. II, p. 207, ln. 9 – p. 208, ln. 10, p. 209, ln. 25 – p. 212, ln. 4, p. 224, ln. 21 – p. 229, ln, 21; HT Vol. IV, p. 408, ln. 22 – p. 413, ln. 15, p. 438, ln. 11 – p. 444, ln. 9; HT Vol. V. p. 535, ln. 23 – p. 536, ln. 5.
[189] Exs. S-21, S-23, S-26, S-227, S-255(b); HT Vol. II, p. 207, ln. 9 – p. 208, ln. 10, p. 209, ln. 25 – p. 212, ln. 4, p. 224, ln. 21 – p. 229, ln, 21; HT Vol. IV, p. 408, ln. 22 – p. 413, ln. 15, p. 426, ln. 14 – p. 438, ln. 10, HT Vol. V. p. 535, ln. 23 – p. 536, ln. 5.
[190] Ex. S-35; HT Vol. II, p. 253, ln. 25 – p. 254, ln. 14.
[191] HT Vol. II, p. 274, lns. 2-13; HT Vol. V, p. 612, ln. 9 – p. 613, ln. 6, p. 658, lns. 16-24; HT Vol. VIII, p. 1043, ln. 25 – p. 1045, ln. 1.

not truthful about the ownership of the Nevada property that he believes was pledged as security, and C&D did not own it outright.[192]

Second, the C&D investment documents advised investors that the investment was "being sold by the officers and directors of the Company [C&D], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[193] Of the investors sold the C&D investments in or from Arizona, Brian Buckley received nearly $15,000 in sales fees/commissions, and even more if all C&D investors are considered. [194] Mr. Buckley was not an officer or director of C&D, a member of NASD (FINRA) or registered as a dealer or salesman in Arizona.[195]

Mogler's accounting expert analyzed use of investor funds from 2009 – 2011, and prepared a report regarding the same.[196] The C&D offering includes investors that invested in 2010 – 2011,[197] and the accounting expert testified that Mogler identified relevant investors for the report.[198] Not only did Mr. Buckley receive sales fees/commissions for bringing in investors, but Mogler's accounting expert's report indicates that Casimer Polancheck and his entities, as identified by Mr. Hinkeldey, received approximately hundreds of thousands of dollars from investor funds for referral fees between 2009 – 2011.[199] Notably, Polanchek is listed as the referral source for numerous investors on the C&D investor list.[200] Neither Polanchek nor his entities were

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[192] HT Vol. VIII, p. 1045, lns. 6-20.
[193] *See e.g.* Ex. S-213 at ACC011099.
[194] Exs. S-35, S-224, S-250.
[195] Exs. S-1(j), S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[196] Exs. S-256 at pp. 10-12, 14-17, 53-54, S-258 – S-259.
[197] Exs. S-35, S-224.
[198] Ex. S-256 at pp. 39-40.
[199] Exs. S-256 at pp. 44-45, S-258 – S-259 at fn. 15& Exhibit 1-M; HT Vol. IX, p. 1073, ln. 18 – p. 1074, ln. 14.
[200] Ex. S-35.

officers or directors of C&D, a member of NASD (FINRA) or registered as dealers or salesmen in Arizona.[201]

Finally, between 2010 – 2011, Mogler used approximately $445,000 of investor funds, which include C&D investor funds, for personal use that was not disclosed to investors.[202]

G. ERCI Investment – Offer Only

1. ERCI Recycling Offering.

The final offering at issue at hearing was the ERCI offering. During the relevant time period, ERCI was a manager-managed limited liability company organized in Arizona in April 2011. During the relevant period, Mogler was the manager of ERCI.[203] During all relevant periods, Mogler was the sole signatory on the ERCI bank accounts.[204]

In January 2012, an out-of-state resident was offered an investment with ERCI ("ERCI offeree") in or from Arizona.[205] The ERCI offeree was emailed a PPM dated December 1, 2011 offering a total of 400 promissory notes in two offerings, with a combined total offering of $10,000,000.00, a subscription agreement, and a note issued by ERCI ("ERCI investment documents"). The first offering in the ERCI investment was for $25,000.00 per note, with a total offering of $5,000,000.00. The first offering provided an 18% annual rate of return, interest paid monthly, with a maturity date for payment of principal in 24 months. The second offering was for $25,000.00 per note, with a total offering of $5,000,000.00. The second offering provided a 12% annual rate of return, interest paid monthly, with a maturity date for payment of principal in 24 months.[206] Although it is not clear from the ERCI investment documents, it appears the ERCI offeree was offered the first offering at 18%. Note holders had no managerial rights or powers.[207]

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[201] Exs. S-1(g), (h) & (k), S-7.
[202] Exs. S-256 at pp. 45-47, 53-54, S-258 – S-259.
[203] Ex. S-6(a).
[204] Ex. S-19 at ACC008522-25.
[205] Exs. S-202 – S-204; HT Vol. II, p. 317, ln. 17 – p. 325, ln. 16.
[206] Exs. S-202 – S-204.
[207] *See e.g.* S-202 at ACC000117.

According to the ERCI investment documents, ERCI was is in the business of investing in rubbish and waste recycling and the purchase/sale of commodities, and investor funds were to be used "to purchase land, equipment, commodities and locomotives, for a new recycling center located in Chicago, Illinois."[208] The ERCI investment documents state that the expanded services in Chicago will be done under the name of ERC Chicago, LLC.[209] The ERCI investment documents list only Peter A. Salazar as active in management in ERCI.[210] Mogler was a signatory for ERCI on the ERCI investment documents.[211] ERCI, the ERCI investment and Mogler were not registered with the Commission.[212]

The ERCI offeree did not invest with ERCI.[213] According to ERCI, who produced documents through Mogler as custodian of records, no investors invested with ERCI.[214]

2. Fraud Related to the ERCI Investment.

The ERCI investment documents list Peter A. Salazar as the only individual in management at ERCI and state that the success of the business is dependent upon his expertise.[215] In fact, at the time this investment was offered, ERCI was a manger-managed limited liability company with Mogler as the manager, and Mogler as the sole signatory on the ERCI bank accounts.[216] There is no evidence that Peter A. Salazar had any affiliation with ERCI. In fact, Mr. Hinkeldey testified at hearing that ERCI was merely a holding company and never an operating company.[217]

Additionally, the ERCI investment documents state that "[t]he Notes being offered by the Company in this Private Placement Offering will be secured by property, equipment and commodities such as locomotives located in its new facility in Chicago, Illinois."[218] The

[208] *See e.g.* Ex. S-202 at ACC000108-109.
[209] *See e.g.* Ex. S-202 at ACC000115.
[210] *See e.g.* Ex. S-202 at ACC000109-110.
[211] *See e.g.* Ex. S-202 at ACC000137.
[212] Exs. S-1(e) & (i).
[213] HT Vol. II, p. 325, lns. 15-17.
[214] Exs. S-29, S-32 at ACC004719; HT Vol. II, p. 325, ln. 19 – p. 327, ln. 14.
[215] *See e.g.* Ex. S-202 at ACC000109-110.
[216] Exs. S-6(a), S-19 at ACC008522-25.
[217] HT Vol. IX, p. 1084, lns. 5-20.
[218] *See e.g.* Ex. S-202 at ACC000113.

investment documents fail to provide investors with enough information to determine if their investment will be adequately securitized. Further, given that the ERCI investment documents state that operations in Chicago will commence under the name ERC Chicago, LLC,[219] investors holding a note from ERCI would not have the ability to securitize their investments.

IV. Legal Argument

The Division established at hearing that TCBD, TCC, ERCC, C&D, & ERCI offered and/or sold securities in or from Arizona in the form of notes and that the notes were offered or sold in violation of the antifraud provisions of the Arizona Securities Act ("Securities Act").

These investments fall squarely under the definition of securities under the Securities Act. A.R.S. § 44-1801(26) defines "any note" is a security. Arizona courts have developed two separate approaches in distinguishing between security and non-security notes under the Securities Act. The analysis used depends upon whether the issue is the violation of the registration provisions or the violation of antifraud provisions of the Securities Act. The Division has alleged both registration and antifraud violations for all of the investments at issue, so an analysis of each is provided.

A. The Notes at Issue are Securities

1. The Notes Are Securities for Registration Violations.

In *State v. Tober*, the Arizona Supreme Court held that the Securities Act provided a clear definition of the term "note" with the words "any note." 173 Ariz. at 211, 841 P.2d 206 (1992). Therefore, the Court had no reason to use any of the tests fashioned by the federal courts for determining whether a particular note was a security for purposes of registration. *Tober*, 173 Ariz. at 213, 213 841 P.2d at 208. The Court held that all notes are securities that must be registered with the Commission unless an exemption applies.

[219] *See e.g.* Ex. S-202 at ACC000115.

In this case, the notes issued in all of the offerings were titled "Promissory Note".[220] All of the notes contained two year terms, and provided 18%, 24%, 40%, 60% or 80% annual interest, with interest and principle to be paid at the end of the term or requiring monthly interest only payments with a principal paid at maturity.[221] Thus, all of the investments at issue clearly meet the definition of "any note" and are subject to the registration requirements unless an exemption applies.

A.R.S. § 44-2033 places the burden on Respondents to show that an exemption applies. None of the respondents presented evidence that any exemption applied to any of the investments.[222] Accordingly, all of the investments are securities for purposes of the registration provisions of the Securities Act.

2. The Notes for Securities for Antifraud Violations.

In *MacCollum v. Perkinson*, the appellate court concluded that a note as a security would be defined differently for purposes of the registration and antifraud provisions of the Securities Act, and adopted the family resemblance test set out by the U.S. Supreme Court in *Reves v. Ernst & Young* for the antifraud provisions. *MacCollum*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996).

In *Reves*, the Court started with the *presumption* that notes are securities and established a two-part test with which the presumption may be rebutted. *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). The first part of the test requires a showing that the note "bears a strong resemblance" to an instrument listed in an enumerated category of exceptions. *Id. Reves* elaborated on this "family resemblance test" and set forth four factors to assist in ascertaining whether a note resembles one of the families of notes that are not securities to allow the presumption to be rebutted. The factors are balanced to reach a determination. Failure to satisfy one of the factors is

[220] Exs. S-52 – S-94, S-104 – S-105, S-107 – S-109, S-111 – S-113, S-128 – S-129, S-132 – S-136, S-141 – S-151, S-153 – S-166, S-172, S-184 – S-190 – S-198 – S-202, S-205 – S-208, S-210 – S-213, S-234 – S-236, S-253.

[221] *Id.*

[222] The Division will address any argument that Respondents make concerning exemptions in its Reply brief, if applicable.

not dispositive; they are considered as a whole. *See McNabb v. S.E.C.*, 298 F.3d 1126, 1132-33 (9th Cir. 2002) (holding that, although the third factor supported neither side's position, the notes in question nevertheless constituted securities).

The first factor established by the Court is to assess the motivations of the buyer and seller to enter into the transaction at issue. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments (not a minor asset or consumer good) and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a security. *Id.* Here, the investment documents for the Mexican land investments specifically state that investment funds were to be used to finance the purchase or development of Mexican land – a substantial investment.[223] The investment documents for the recycling investments state the use of investor funds was to purchase significant assets such as equipment, and to expand the business.[224] This is also a substantial investment and general use of investor funds by the businesses, which favor a finding of a security.

Investors purchased the notes with the expectation of a substantial return on their investment, as reflected in the significant interest rates of 18-80%.[225] *See In re Greenbelt Property Management, LLC*, 2013 WL 3199809, *2 (D. Ariz. Jun. 21, 2013); *S.E.C v. J.T. Wallenbrock & Associates*, 313 F.3d 531, 538 (9th Cir. 2002) (finding that "a high, stable 20% interest rate likely attracted investors looking for significant profits). Thus, under the first factor of the *Reves* test, the investments are securities.

The second factor is the plan of distribution. The court stated that the plan of distribution must be examined to determine if the "note" is an instrument in which there is "common trading for speculation or investment." *Id.* at 68-69. When discussing this factor, the *MacCollum* court noted that "Offering and selling to a broad segment of the public is all that is required to establish

[223] Exs. S-52 – S-94, S-104 – S-105, S-107 – S-109, S-111 – S-113, S-128 – S-129, S-132 – S-136, S-141 – S-151, S-153 – S-166, S-172, S-184 – S-189, S-236, S-253.
[224] Exs. S-190 – S-198 – S-201, S-205 – S-208, S-210 – S-213, S-234 – S-235.
[225] Exs. S-52 – S-94, S-104 – S-105, S-107 – S-109, S-111 – S-113, S-128 – S-129, S-132 – S-136, S-141 – S-151, S-153 – S-166, S-172, S-184 – S-190 – S-198 – S-202, S-205 – S-208, S-210 – S-213, S-234 – S-236, S-253.

the requisite 'common trading' in an instrument." 185 Ariz. at 187, 913 P.2d at 1105. Here, the various offerings were offered and/or sold to the public at large as evidenced by the investor lists and documents provided by Respondents, statements made by investors, and the issuer Respondents' main salesman, Brian Buckley. Hundreds invested in the various Mexican land and recycling offerings at issue, and were residents of numerous states as well as Canada and Denmark.[226]

Investors in the Mexican land offerings were solicited via magazine advertisements, seminars/presentations either in person or via the internet, by their self-directed IRA provider, and some of the offerings were even promoted via public radio broadcast on the Investment Roadshow.[227] One of the Mexican land investments was offered in China.[228] Multiple investors testified they had no preexisting relationship with TCMLD or TCC before investing.[229] Stevens admitted that he did not know the investors that invested with TCMLD, that they had no preexisting relationship with TCMLD before investing, and could not identify how they were solicited.[230] TCC's representative admitted the same with regard to the Lot 47 TCC investment – except for possibly one, investors had no preexisting relationship with TCC and he had no idea how they were solicited.[231] The recycling offerings were offered and/or sold to the public at large via presentations, webinars, and radio broadcasts as well.[232]

In defining common trading, federal courts, including the Ninth Circuit, have considered the fact that individuals, as opposed to financial institutions, were solicited, and found the common trading element was satisfied due to the purchaser's need for protection under the securities laws.

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[226] Exs. S-35, S-38, S-44, S-47, S-50 – S-51, S-219 – S-224.

[227] Exs. S-21, S-23, S-26, S-50, S-115, S-176, S-222, S-227, S-229, S-255(a) & (b); HT Vol. I, p. 85, lns. 13-20, p. 87, lns. 21-24; HT Vol. II, p. 207, ln. 9 – p. 208, ln. 10, p. 209, ln. 25 – p. 212, ln. 4, p. 224, ln. 21 – p. 229, ln, 21, p. 231, ln. 25 – p. 232, ln. 23, p. 243, ln. 16 – p. 244, ln. 15, p. 253, ln. 25 – p. 254, ln. 12; HT Vol. IV, p. 408, ln. 22 – p. 413, ln. 15, p. 416, ln. 22 – p. 424, ln.22, p. 426, ln. 14 – p. 438, ln. 10, p. 478, lns. 2-6, p. 503, ln. 4 – p. 505, ln. 13; HT Vol. V. p. 533, ln. 14 – p. 536, ln. 5, p. 633, lns. 5-21; HT Vol. VI, p. 688, lns. 7-23.

[228] Ex. S-171.

[229] HT Vol. IV, p. 478, lns. 19-22; HT Vol. VI, p. 505, lns. 14-17, p. 677, lns. 16-23, p. 689, lns. 7-16.

[230] HT Vol. VII, p. 847, ln. 22 – p. 848, ln. 18.

[231] HT Vol. VIII, p. 1022, ln. 2 – p. 1023, ln. 23.

[232] Exs. S-21, S-23, S-26, S-35, S-230, S-255(c); HT Vol. II, p. 207, ln. 9 – p. 208, ln. 10, p. 209, ln. 25 – p. 212, ln. 4, p. 224, ln. 21 – p. 229, ln, 21, p. 253, ln. 21– p. 254, ln. 14; HT Vol. IV, p. 408, ln. 22 – p. 413, ln. 15, p. 438, ln. 11 – p. 444, ln. 9; HT Vol. V. p. 533, ln. 14 – p. 536, ln. 5, p. 600, ln. 22 – p. 601, ln. 6, p. 612, lns. 1-5, p. 652, lns. 6-25.

See McNabb, 298 F.3d at 1132; *Stoiber v. S.E.C.*, 161 F.3d 745, 751 (D.C. Cir. 1998); *S.E.C. v. Global Telecom Services, L.L.C.*, 325 F.Supp. 2d 94 (D.Conn. 2004) (stating that the broad sale to the public factor must be weighed against the purchaser's need for protection and noting that where notes are sold to individuals rather than sophisticated institutions, common trading has been found). The fact that the notes are sold to individuals with no particular sophistication must be considered in evaluating the common trading factor. *See McNabb*, 298 F.3d at 1132 (noting that the securities laws were intended to protect the sale of notes to six individuals, which was different than the situation in *Resolution Trust Corp. v. Stone,* 998 F.2d 1534, 1539 (10th Cir.1993) where the sale was to specialized and sophisticated financial institutions and insurance companies).

As noted above, most investors in these offerings had no prior investing experience with the issuers. Further, documents showed, and investors gave testimony, that there were numerous unaccredited investors, investors that could not afford to lose their investment, and investors that had no prior investing experience in Mexican land or recycling.[233] These notes were not offered and sold to sophisticated financial institutions, but instead to investors that need the protection of the securities laws. The second factor also weighs in favor of a finding that the note investments are securities.

The third factor is to examine the reasonable expectations of the investing public. The *Reves* Court stated that it will consider instruments to be securities on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not securities as used in that transaction. 494 U.S. at 68. The question is whether a reasonable member of the investing public would consider the note an investment, and is closely related to the first factor - motivation. *Wallenbrock*, 313 F.3d at 539 (citing *MacNabb*, 298 F.3d at 1132). "The court must look to a reasonable investor, not the specific individuals in question." *MacNabb*, 298 F.3d at 1132. Particularly when the promoters

[233] Exs. S-35, S-38, S-50, S-141 – S-143, S-145 – S-146, S-148 – S-150, S-154 – S-159, S-162, S-172, S-176, S-191 – S-193; S-208, S-210 – S-213, S-234; HT Vol. IV, p. 478, lns. 23-25, p. 505, lns. 18-20; HT Vol. V, p. 557, ln. 23 p. 558, ln. 8, p. 638, lns. 7-9, p. 656, lns. 2-16; HT Vol. VI, p. 680, lns. 14-16.

characterize the notes as "investments" it is "reasonable for a prospective purchaser to take [the promoters] at [their] word." *Reves*, 494 U.S. at 69.

On their face, the investment documents for all of the offerings at issue refer to the notes as "securities" in numerous places (albeit one the issuers believed were "exempt", which they are not).[234] The investment documents also refer to the notes as "investments" and the note holders as "investors".[235] Further, correspondence to and from offerees and investors, many times from Brian Buckley designated as having the title "Investor Relations", refer to "investors" and "investments."[236] Even more tellingly, these offerings were promoted on the radio to "investors" as "investments."[237] Again, investors purchased the notes with the expectation of a substantial return on their investment, as reflected in the significant interest rates of 18-80%.[238] The third factor clearly weighs in favor of finding the notes are securities.

The fourth and final factor is whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the securities laws unnecessary. *Reves*, 494 U.S. at 68; *see also MacNabb*, 298 F.3d at 1132. Because none exist, the record contains no evidence of risk-reducing factors that would obviate the need for the securities laws to apply. Despite the statements in the investment documents claiming the notes for the offerings at issue are "Secured Promissory Notes",[239] none of the investments were actually securitized.[240] Consequently, under the fourth *Reves* factor, the notes in these offerings are securities.

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[234] *See e.g.* Exs. S-107 at ACC000157, 000159 ("The Securities offered are Seven Hundred (700) Notes . . ."), S-128 at TRI_C007634-7636 ("The Securities offered are Seven Hundred (700) Notes . . ."), S-149 at TRI_C005964-5965 ("The Securities offered are Four Hundred and Fifty (450) Notes . . ."), S-187 at TRI_C003272-3273 ("The Securities offered are Five Hundred (500) Notes . . ."), S-191 at ERCC_000307, 000309 ("The Securities offered are One Hundred (100) Notes . . ."), S-213 at ACC011092-11094 ("The Securities offered are Sixty (60) Notes . . ."), S-202 at ACC000106-000108 ("The Securities offered are Four Hundred (400) Notes . . .").

[235] *See e.g.* Exs. S-107, S-128, S-149, S-187, S-191, S-202, S-213.

[236] *See e.g.* Exs. S-95, S-99, S-103 – S-104, S-109, S-116, S-140, S-152, S-171, S-203, S-247, S-248.

[237] Exs. S-227, S-229 – S-231.

[238] Exs. S-52 – S-94, S-104 – S-105, S-107 – S-109, S-111 – S-113, S-128 – S-129, S-132 – S-136, S-141 – S-151, S-153 – S-166, S-172, S-184 – S-190 – S-198 – S-202, S-205 – S-208, S-210 – S-213, S-234 – S-236, S-253.

[239] *See e.g.* Exs. S-107 at ACC000154, S-128 at TRI_C007631, S-149 at TRI_C005961, S-187 at TCC_003269, S-191 at ERCC_000305, S-213 at ACC011090.

[240] HT Vol. I, p. 132, lns. 6-24, p. 186, ln. 13 – p. 187, ln. 7; HT Vol. II, p. 245, lns. 6-15, p. 274, lns. 2-13; HT Vol. IV, p. 466, lns. 18-22, p. 497, lns. 2-10, p. 500, lns. 5-7, p. 510, ln. 19 – p. 511, ln. 14, p. 522, lns. 6-17; HT Vol. V, p.

Under the first part of the two part *Reves* test, the notes at issue should be categorized as securities. The second part of the *Reves* test is that if the note does not resemble one of the families of notes that are not securities, then, using the same four factors, the presumption may be rebutted by a showing that the note represents a category that should be added as a non-security. *Id.* The above analysis of the four factors negates rebuttal of the presumption on the second part of the *Reves* test as well. The notes at issue in all of the offerings are securities for purposes of the antifraud provisions of the Securities Act.

B. The Notes Were Offered and Sold in or From Arizona in Violation of A.R.S. § 44-1841 and § 44-1842

The securities offered and sold in all of the offerings at issue violated A.R.S. § 44-1841. This section of the Securities Act makes it unlawful to offer or sell securities in or from Arizona unless they have been registered. Pursuant to A.R.S. § 44-2034, the Division presented a certificates of non-registration for the securities at issue,[241] which establishes that none of the offerings at issue were registered with the Commission.

Additionally, the dealers that sold the securities at issue in or from Arizona violated A.R.S. § 44-1842. A.R.S. § 44-1842 makes it unlawful for any dealer or salesman to offer or sell any securities in or from Arizona unless the dealer or salesman is registered with the Commission.

1. TCBD Liability for Registration Violations for TCMLD Offering.

TCMLD has already been defaulted, found to have violated § 44-1841 and § 44-1842, and ordered to pay administrative penalties and restitution to its investors in this matter. *See* Decision 73667. However, the Division established at hearing that the TCMLD offering was not registered with the Commission in violation of § 44-1841.[242]

561, lns. 10-14, p. 575, lns. 19-23, p. 590, lns. 7-18, p. 601, lns. 2-24, p. 612, ln. 9 – p. 613, p. 639, lns. 15-18, ln. 6, p. 658, lns. 16-24; HT Vol. VI, p. 681, ln. 23 – p. 682, ln. 1, p. 696, ln. 20 – p. 697, ln. 4; HT Vol. VII, p. 833, lns. 15-18; p. 835, ln. 13 – p. 837, ln. 13; HT Vol. VIII, p. 1008, ln. 16 – p. 1011, ln. 15, p. 1035, lns. 6-8, p. 1043, ln. 25 – p. 1045, ln. 1; HT Vol. IX, p. 1060, ln. 20 – p. 1061, ln. 2.

[241] Exs. S-1(a), (b), (d), (e), & (f).

[242] Ex. S-1(b).

TCBD acted as agent for TCMLD for the TCMLD offering, raising capital and holding and managing investor funds.[243] Investors in the TCMLD investment were instructed to forward their investment documents to TCMLD, and to wire or make their investment checks payable to TCBD, both at the same address in Scottsdale, Arizona.[244] Thus, TCBD offered and sold the unregistered TCMLD offering in or from Arizona in violation of A.R.S. § 44-1841. Additionally, TCBD was not registered as a dealer or salesman when offering and selling this unregistered security.[245] This violated A.R.S. § 44-1842.

At hearing the Division established sixty-one investments in the TCMLD offering that were offered and sold in or from Arizona.[246] TCBD therefore violated A.R.S. § 44-1841 sixty-one times, and violated A.R.S. § 44-1842 sixty-one times.

2. TCC Liability for Registration Violations for 2/08, 3/08 and 6/10 Offerings.

The Division established at hearing that the TCC offerings dated 2/08, 3/08 and 6/10 were not registered with the Commission.[247] Therefore, the offers and sales of these offerings by TCC violated A.R.S. § 44-1841. The offers and sales by TCC for these offerings also violated A.R.S. § 44-1842 because TCC was not registered as a dealer or salesman.[248]

The Division established at hearing that the TCC 2/08 offering was offered and sold seven times in or from Arizona.[249] TCC violated A.R.S. § 44-1841 seven times, and violated A.R.S. § 44-1842 seven times for the 2/08 offering.

The Division further established that the TCC 3/08 offering was offered and sold by TCC twenty-nine times in or from Arizona.[250] TCC therefore violated A.R.S. § 44-1841 twenty-nine times, and violated A.R.S. § 44-1842 twenty-nine times for the 3/08 offering.

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[243] Ex. S-124.
[244] *See e.g.* Exs. S-107 at ACC00177, 00179, S-119.
[245] Ex. S-1(c).
[246] Exs. S-33, S-50 –S-105, S-107 – S-109, S-111 – S-116, S-219, S-253; HT Vol. I, p. 41, ln. 24 – p. 47, ln. 2, p. 49, ln. 3-12, p. 66, ln. 17 – p. 109, ln. 5 – p. 220, ln. 16; HT Vol. IV, p. 462, ln. 2 – p. 465, ln. 10, p. 468, ln. 25 – p. 469, ln. 10; HT Vol. VII, p. 839, ln. 13-18.
[247] Ex. S-1(a).
[248] *Id.*
[249] Exs. S-30, S-32 at ACC004716, S-50, S-128 – S-129, S-132 – S-138, S-140, S-220; HT Vol. I, p. 49, ln. 3-12, p. 127, ln. 4 – p. 129, ln. 23, p. 135, ln. 24 – p. 144, ln. 7; HT Vol. IV, p. 462, ln. 2 – p. 465, ln. 10, p. 468, ln. 25 – p. 469, ln. 10.

Finally, the Division established that TCC offered and sold the 6/10 offering in or from Arizona seven times. TCC therefore violated A.R.S. § 44-1841 seven times, and violated A.R.S. § 44-1842 seven times for the 6/10 offering.

3. ERCC Liability for Registration Violations.

At hearing, the Division established that the ERCC offering was not registered with the Commission, nor was ERCC registered as a dealer or salesman.[251] As a result, the offers and sales of the ERCC offerings by ERCC violated A.R.S. § 44-1841. ERCC also violated A.R.S. § 44-1842 because ERCC was not registered as a dealer or salesman when making the offers and sales. The Division presented evidence that ERCC offered and sold the ERCC offering in or from Arizona ten times. ERCC therefore violated A.R.S. § 44-1841 ten times, and violated A.R.S. § 44-1842 ten times for the ERCC offering.

4. C&D and TCBD Liability for Registration Violations for C&D Offering.

The Division presented evidence at hearing that the C&D offering was not registered with the Commission.[252] C&D therefore violated A.R.S. § 44-1841 by offering and selling the unregistered investment. TCBD also offered and sold the unregistered C&D offering in or from Arizona in violation of A.R.S. § 44-1841. TCBD, by Mogler, executed a Consultant Agreement with C&D in October 2010.[253] The Consultant Agreement appointed TCBD to perform various tasks for C&D, including preparing the C&D investment documents and acting as investor liaison for a fee of $1,500,000.[254] The C&D investment documents advised investors that TCBD was acting as agent for C&D and directed investors to deliver their investment documents to TCBD in Scottsdale, Arizona and to make their investment checks payable to TCBD.[255]

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[250] Exs. S-141 – S-151, S-153 – S-166, S-170 – S-171, S-221; HT Vol. I, p. 170, ln. 6 – p. 171, ln. 25, p. 172, ln. 22 – p. 186, ln. 3; HT Vol. V, p. 555, ln. 3 – p. 556, ln. 6, p. 560, lns. 9-14, p. 570, ln. 5 – p. 571, ln. 7, p. 573, lns. 10-21.
[251] Ex. S-1(d).
[252] Ex. S-1(f).
[253] Ex. S-216.
[254] *Id.* at ACC009590.
[255] *See e.g.* Ex. S-213 at ACC011114-11115.

Additionally, both C&D and TCBD were not registered as dealers or salesmen when offering and selling this unregistered security.[256] C&D and TCBD violated A.R.S. § 44-1842. The Division presented evidence that C&D and TCBD offered and sold the C&D offering in or from Arizona eleven times.[257] C&D and TCBD therefore violated A.R.S. § 44-1841 eleven times each, and each violated A.R.S. § 44-1842 eleven times for the C&D offering.

5. ERCI Liability for Registration Violations.

The Division established at hearing that the ERCI offering was not registered with the Commission, nor was ERCI registered as a dealer or salesman.[258] As a result, the offer of the ERCI offerings by ERCI violated A.R.S. § 44-1841. ERCI also violated A.R.S. § 44-1842 because ERCI was not registered as a dealer or salesman when making the offer. The Division presented evidence that ERCI offered the ERCC offering in or from Arizona,[259] and ERCI therefore violated A.R.S. § 44-1841 and A.R.S. § 44-1842.

C. The Note Offerings Were Offered and Sold Using Fraud

All of the offerings at issue were sold in violation of the antifraud provisions of the Securities Act. Further, Mogler has joint and several liability for the fraud with most of the primary violators as the controlling person.

1. Primary Liability Under A.R.S. § 44-1991.

Fraud, including untrue statements of material fact and material omissions, in the offer or sale of securities violates the Securities Act. *See* A.R.S. § 44-1991(A)(2) (it is a fraud to "[m]ake any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading."). As it relates to fraud, the standard of materiality is whether a reasonable investor would have wanted to know the omitted facts. See *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892

[256] Ex. S-1(c).
[257] Exs. S-197, S-205, S-206, S-208, S-210 – S-213, S-224; HT Vol. II, p. 253, ln. 25 – p. 276, ln. 13; HT Vol. V, p. 616, ln. 5 – 619, ln. 1, p. 653, lns. 11-23, p. 657, lns. 8-24.
[258] Ex. S-1(e).
[259] Exs. S-202 – S-204; HT Vol. II, p. 317, ln. 17 – p. 325, ln. 16.

(App. 1981). In the context of these provisions, the term "material" requires a showing of substantial likelihood that, under all the circumstances, the misstated or omitted fact would have assumed actual significance in the deliberations of a reasonable investor. *See Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (1986) (citing *Rose*, 128 Ariz. at 214, 624 P.2d at 892) (quoting *TSC Industries v. Northway, Inc.*, 426 U.S. 438 (1976)). There is an affirmative duty not to mislead potential investors in any way - a heavy burden on the offeror – and the investor is not required to investigate or act with due diligence. *Trimble*, 152 Ariz. at 553, 733 P.2d at 1136.

Additionally, a misrepresentation or omission of a material fact in the offer and sale of a security is actionable even though it may be unintended or the falsity or misleading character of the statement may be unknown. In other words, scienter or guilty knowledge is not an element of a violation of A.R.S. § 44-1991. *See, e.g., State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604, 607 (1980). Stated differently, a seller of securities is strictly liable for any of the misrepresentations or omissions he makes. *See Rose*, 128 Ariz. at 214, 624 P.2d at 892. Unlike common law fraud, reliance upon a misrepresentation is not an element in fraud involving the offer or sale of securities. *Id.*

a. TCBD is liable for fraud related to the TCMLD offering.

TCBD, acting as the dealer for the TCMLD offering, is liable for the antifraud violations used to offer and sell the investment. Fraudulent misrepresentations or omissions related to the TCMLD offering include the following:

- *Stevens' financial status.* The investment documents for the TCMLD offering stated that Stevens was one of the managers upon which the success of TCMLD was dependent, touting his business experience by stating that Stevens was the "Principal" with a long successful history in real estate.[260] However, the investment documents failed to disclose that as of the date the investments were being offered, Stevens had multiple federal tax

[260] *See e.g.* Exs. S-107 at ACC000160.

liens recorded against him in Florida totaling over $100,000.[261] This is a material omission.

- *Misrepresentation regarding management's qualifications.* The TCMLD investment documents also stated that the success of TCMLD was "dependent on the services and expertise of existing management." The PPM listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[262] In fact, Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[263] This was a material misrepresentation.
- *Ownership and security for the subject land.* Fraud related to the subject Mexican land for this offering – Lot 5 – is multilayered. TCMLD investment documents represented that the notes being offered were "Secured Promissory Notes" and "are secured by the land Tri-Core Mexico Land Development, LLC purchases."[264] Investors were told that TCMLD would own Lot 5 and securitize its investors with that land when that was legally impossible. First, despite representing that TCMLD was going to purchase the subject Mexican land, investors were not informed that an American entity cannot legally directly own the ocean-front Mexican property at issue; it must be held in a bank trust or a Mexican corporation.[265] Second, at least three investors were told that the investment was "safe" due to the security that was pledged.[266] Investors were not informed of any risk that that their investments would not be secured. It is axiomatic that one cannot pledge security in land it does not own. TCMLD has never purchased Lot 5, or any other Mexican real estate with investor funds, and has not securitized its investors in any way.[267] Third, and undisclosed to investors, one of the five parcels of Lot 5 that was supposed to collateralize investors, Parcel 5 of Lot 5, was promised to TCBD as compensation.[268] This is a material

[261] Exs. S-52 – S-94, S-104 – S-105, S-107 – S-109, S-111 – S-113, S-244 – S-245, S-253; HT Vol. I, p. 55, ln. 9 – p. 56, ln. 24; HT Vol. IV, p. 465, ln. 23- p. 466, ln. 1.
[262] *See e.g.* Ex. S-128 at TRI_C007637.
[263] Ex. S-218; HT Vol. I, p. 51, ln. 3 – p. 55, ln. 5.
[264] *See e.g.* Ex. S-107 at ACC000154, 000164; HT Vol. VI, p. 692, ln 1 - 7.
[265] Ex. R-14; HT Vol. VII, p. 833, ln. 19 – p. 835, ln. 7; HT Vol. VIII, p. 898, ln. 21 – p. 900, ln. 25, p. 990, lns. 3-25.
[266] Exs. S-104, S-109 at ACC010581; HT Vol. IV, p. 480, ln. 22 – p. 481, ln. 8; HT Vol. VI, p. 688, ln. 24 – p. 689, ln. 6, p. 689, ln. 19 – p. 690, ln. 19, p. 692, lns. 8-19.
[267] HT Vol. IV, p. 466, lns. 18-22; HT Vol. VI, p. 696, ln. 20 – p. 697, ln. 4; HT Vol. VII, p. 833, lns. 15-18; p. 835, ln. 13 – p. 837, ln. 13.
[268] HT Vol. VII, p. 804, lns. 3-10, p. 845, lns. 3-22.

omission. Fourth, investors were advised before investing that TCMLD had entered into a contract to purchase Lot 5, the subject investment property.[269] Although Respondents failed to produce the purchase contract at hearing, Stevens testified that the purchaser on the contract was *Sylvia Torres*, not TCMLD. This is a material misstatement.

- *Failure to disclose legal issues regarding Lot 5.* Not only does TCMLD not hold the contract to purchase Lot 5, but the legality of the contract held by Sylvia Torres has been at issue since 2007 and is purportedly being litigated in the Mexican courts.[270] Despite knowledge of the title issue in 2007, thirty investors invested in the TCMLD Lot 5 offering in 2008, with no mention of the title issue with Lot 5 in the offering materials.[271] This is also a material omission.
- *Misrepresentation regarding salesmen qualifications regarding commissions.* The TCMLD investment documents stated that the investment was "being sold by officers and directors of the Company [TCMLD], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[272] This was a material misrepresentation because, in fact, investors were solicited by and sold investments in TCMLD through individuals that were not officers or directors of TCMLD, nor were they members of NASD (FINRA) or registered as a dealer or salesman in Arizona, and yet received commissions.[273] One of these unregistered salesmen, Brian Buckley, received sales fees/commissions for over 30 investors he solicited to invest in the TCMLD offering.[274]

These material omissions and material affirmative misrepresentations constitute at least seven instances of violations of A.R.S. § 44-1991 for all sixty-one TCMLD investors, and another

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[269] Exs. S-104 at ACC004740, S-109 at ACC010549; HT Vol. I, p. 132, lns. 6-24; HT Vol. IV, p. 479, ln. 13 – p. 480, ln. 10.
[270] HT Vol. VII, p. 807, ln. 23 – p. 808, ln. 1, p. 814, lns. 16-22, p. 821, ln. 20 – p. 822, ln. 19, p. 826, lns. 10-23.
[271] Exs. S-52 – S-60, S-64 – S-68, S-70 – S-73, S-76, S-80 – S-81, S-83, S-85, S-89 – S-91, S-93 – S-94, S-107, S-112 – S-113, S-219.
[272] *See e.g.* Ex. S-107 at ACC000165.
[273] Exs. S-1(j), S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[274] Exs. S-1(j), S-125, S-250.

violation (failure to disclose the legal issue pending on Lot 5) for at least thirty TCMLD investors. Thus, TCBD violated A.R.S. § 44-1991 over four hundred and fifty times for this offering.

b. TCC is liable for fraud related to the TCC 2/08 offering.

TCC is liable for the antifraud violations used to offer and sell the TCC 2/08 investment. Fraudulent misrepresentations or omissions related to the TCC 2/08 offering include the following:

- *Failure to use investors funds for stated purpose.* Although investors were advised their funds would be used to purchase Lot 5, TCC's representative admitted that Lot 5 has not been purchased due to title issues, and thus investor funds were not used for any land purchase. In fact, he could not identify how investor funds in the TCC 2/08 investment were used.[275] This is a material misrepresentation as to how investor funds would be used.
- *Ownership and security for the subject land.* This offering by TCC in Lot 5 involves multiple instances of fraud related to ownership and security for the subject Mexican land. First, the TCC 2/08 investment documents advised investors that it was offering "Secured Promissory Notes."[276] The investment documents also stated the "Notes being offered by the Company in this Private Placement Offering are secured by the land Tri-Core Companies, LLC purchases" and the accompanying business plan stated, "[t]he Company [TCC] has acquired the 250-acre plus Lot 5 land parcel . . ."[277] This is a material misrepresentation because at a minimum, it confuses investors as to whether or not TCC owned Lot 5, and gives the impression that the investments were securitized. Further, this was a material misrepresentation because TCC could never directly own the ocean-front Mexican property at issue; it must be held in a bank trust or a Mexican corporation.[278] Title to Lot 5 has never been held by TCC, nor have investors received any proof of ownership or security for their investments.[279] Investors were not informed of any risk that that their investments would not be secured. TCC cannot pledge security in land it does not own. Second, Lot 5 that is referenced in the TCC 2/08 investment is the same property description provided to investors in the TCMLD investment, and the previous offering

[275] HT Vol. IX, p. 1062, ln. 23 – p. 1063, ln. 10.
[276] *See e.g.* Ex. S-128 at TRI_C007631.
[277] *See e.g.* Ex. S-128 at TRI_C007641, 7677.
[278] Ex. R-14; HT Vol. VII, p. 833, ln. 19 – p. 835, ln. 7; H.T. Vol. VIII, p. 898, ln. 21 – p. 900, ln. 25, p. 990, lns. 3-25.
[279] HT Vol. I, p. 132, lns. 6-24; HT Vol. IV, p. 497, lns. 2-10, p. 500, lns. 5-7, p. 510, ln. 19 – p. 511, ln. 14, p. 522, lns. 6-17; HT Vol. IX, p. 1060, ln. 20 – p. 1061, ln. 2.

pledging the same security to investors was not disclosed to TCC 2/08 offering investors.[280] This is a material omission because it is a dilution of the collateral. Third, the offering misrepresents the collateral and TCC's rights to that collateral. The investment documents for the 3/08 offering state that the collateral will be the full 250-acre Lot 5 despite the fact that TCC's representative testified that the collateral was only a portion of Lot 5 – Parcel 5 of Lot 5 – approximately one-fifth of Lot 5. Further, TCC still had no rights to Parcel 5 because, at most, it had been pledged to TCBD, not TCC.[281] These statements regarding the collateral were material misrepresentations.

- *Failure to disclose legal issues regarding Lot 5.* As stated previously, at the time these investments were offered and sold by TCC, the rights under a purchase contract for Lot 5 were in dispute, and continue to be in dispute, yet this information was not disclosed to investments in the offering materials.[282] This is a material omission.
- *Misrepresentation regarding management's qualifications.* The TCC 2/08 investment documents also stated that the success of TCC was "dependent on the services and expertise of existing management." The PPM listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[283] This was a material misrepresentation because, in fact, Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[284]
- *Misrepresentation regarding salesmen qualifications regarding commissions.* The TCC 2/08 investment documents advised investors that the investment was "being sold by the officers and directors of the Company [TCC], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may

[280] Exs. S-128 – S-129, S-132 – S-136; HT Vol. I, p. 134, ln. 22 – p. 135, ln. 15; HT Vol. IV, p. 497, lns. 11-14, p. 509, ln. 21 – p. 510, ln. 5.
[281] *See e.g.* Ex. S-128 at TRI_C007677; HT Vol. VII, p. 804, lns. 4-10, p. 845, lns. 3-14; HT Vol. IX, p. 1061, lns. 3-10.
[282] Exs. S-128 – S-129, S-132 – S-136; HT Vol. VII, p. 807, ln. 23 – p. 808, ln. 1, p. 814, lns. 16-22, p. 821, ln. 20 – p. 822, ln. 19, p. 826, lns. 10-23.
[283] *See e.g.* Ex. S-128 at TRI_C007637.
[284] Ex. S-218; HT Vol. I, p. 51, ln. 3 – p. 55, ln. 5.

receive commissions up to ten percent (10%) of the price of the Notes sold."[285] This was a misrepresentation because Brian Buckley received sales fees/commissions for all but one of the TCC 2/08 Lot 5 investors at issue.[286] Mr. Buckley was not an officer or director of TCC, a member of NASD (FINRA) or registered as a dealer or salesman in Arizona.[287] TCC's representative admitted at hearing that he had no idea if the salespeople selling the TCC investments were registered with FINRA or in Arizona.[288] These were material misrepresentations.

These material omissions and material affirmative misrepresentations constitute at least eight instances of violations of A.R.S. § 44-1991 for the seven TCC 2/08 investors. Thus, TCC violated A.R.S. § 44-1991 over fifty times for this offering.

c. TCC is liable for fraud related to the TCC 3/08 offering.

TCC is liable for the antifraud violations used to offer and sell the TCC 3/08 investment. Fraudulent misrepresentations or omissions related to the TCC 3/08 offering include the following:

- *Ownership and security for the subject land.* The TCC 3/08 investment documents advised investors that TCC was offering "Secured Promissory Notes."[289] The investment documents also stated, "[t]he Notes being offered by the Company in this Private Placement Offering are secured by the land Tri-Core Companies LLC purchases" and identified the property in the accompanying business plan as, "Lot 47" or "Relaxante."[290] Mogler and others offering the 3/08 investment further represented in public broadcasts during the time the TCC 3/08 investment was offered that investments in Mexican land were "safe" because they are secured by land and that investors were in a "first lien position".[291] However, undisclosed to investors, Lot 47 could not be held by TCC in Mexico due to Mexican laws. TCC's representative admitted that the 3/08 investment documents advised investors that TCC would own Lot 47, which was something that could

[285] *See e.g.* Ex. S-128 at TRI_C007642.
[286] Exs. S-150, S-250.
[287] Exs. S-1(j), S-150, S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[288] HT Vol. IX, p. 1073, lns. 7-17.
[289] *See e.g.* Ex. S-149 at TRI_C005961.
[290] *See e.g.* Ex. S-149 at TRI_C005971, 006009-10.
[291] Exs. S-21, S-23, S-26, S-227, S-229, S-255(a) & (b); HT Vol. II, p. 207, ln. 9 – p. 208, ln. 10, p. 209, ln. 25 – p. 212, ln. 4, p. 224, ln. 21 – p. 229, ln, 21, p. 231, ln. 25 – p. 232, ln. 23; HT Vol. IV, p. 408, ln. 22 – p. 413, ln. 15, p. 416, ln. 22 – p. 424, ln. 22, p. 426, ln. 14 – p. 438, ln. 10; HT Vol. V. p. 535, ln. 23 – p. 536, ln. 5.

not legally happen in Mexico.[292] In fact, the only relevant document at hearing was a Sales Agreement for Lot 47 with the purchaser identified as "Phoenix Premium Developers, Sociedad De Responsabilidad Limitada De Capital Variable", not TCC.[293] TCC's representative at hearing that Lot 47 is held by Phoenix Premium Developers, an S. de R.L. (Mexican corporation), and admitted that the land could not be held in fee simple title by an American entity.[294] This was a material misrepresentation. As a result, investors have not been provided proof that TCC purchased Lot 47,[295] or proof that they hold any security in Lot 47.[296] Second, although TCC's representative admitted that there is a mechanism in Mexico to secure the TCC 3/08 investors with Lot 47, he also admitted that TCC 3/08 investors are not securitized by Lot 47 because it was too costly to TCC to do so.[297] Investors were never told that there was a risk they would not be provided any security, and in fact, the title of "Secured Promissory Notes" indicates the opposite. Given that the TCC 3/08 investment documents promised security in Lot 47, this was a material misrepresentation.

- *Misrepresentation regarding management's qualifications.* The TCC 3/08 investment documents also stated that the success of TCC was "dependent on the services and expertise of existing management." The investment documents listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[298] This was a material misrepresentation because Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[299]
- *Misrepresentation regarding salesmen qualifications regarding commissions.* The TCC 3/08 investment documents advised investors that the investment was "being sold by the officers and directors of the Company [TCC], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter

[292] HT Vol. VIII, p. 1004, ln. 20 – p. 1005, ln. 3.
[293] Exs. S-45(a), S-45(b); HT Vol. I, p. 159, ln. 19 – p. 165, ln. 2.
[294] Ex. R-14; HT Vol. VIII, p. 900, ln. 4 – p. 907, ln. 19, p. 928, lns. 10-21, p. 990, lns. 9-11.
[295] Ex. S-45(a); HT Vol. V, p. 561, lns. 6-9, p. 574, ln. 13 – p. 575, ln. 18, p. 639, lns. 11-14.
[296] HT Vol. I, p. 186, ln. 13 – p. 187, ln. 7; HT Vol. V, p. 561, lns. 10-14, p. 575, lns. 19-23, p. 639, lns. 15-18.
[297] HT Vol. VIII, p. 1008, ln. 16 – p. 1011, ln. 15, p. 1035, lns. 6-8.
[298] *See e.g.* Ex. S-149 at TRI_C005966.

into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[300] Brian Buckley received sales fees/commissions for the majority of the TCC 3/08 Lot 47 investors at issue, totaling approximately $30,000.[301] Mr. Buckley was not an officer or director or TCC, a member of NASD (FINRA) or registered as a salesman in Arizona.[302] Further, Kathleen Randolph also received sales fees/commissions for bringing in at least one Lot 47 investor, yet she was not an officer or director of TCC, a member of NASD (FINRA) or registered as a dealer or salesman in Arizona.[303] Mogler also retained an accounting expert to analyze use of investor funds from 2009 – 2011, and prepared a report regarding the same.[304] The accounting expert specifically relied on Mogler when categorizing expenses for his report.[305] The 3/08 TCC offering includes investors that invested in 2009 – 2010,[306] and the accounting expert testified that Mogler identified relevant investors for the report.[307] Not only did Mr. Buckley and Ms. Randolph receive sales fees/commissions for bringing in investors, but Mogler's accounting expert's report indicates that Casimer Polancheck and his entities, as identified by Mr. Hinkeldey, received approximately hundreds of thousands of dollars from investor funds for referral fees between 2009 – 2011.[308] Neither Polanchek nor his entities were officers or directors of TCC, a member of NASD (FINRA) or registered as dealers or salesmen in Arizona.[309] Thus, this was a material misstatement.

- *Misuse of investor funds.* According to Mogler's expert, between 2009 – 2010, Mogler used approximately $345,000 of investor funds, including investor funds from the TCC 3/08 offering, for personal use that was not disclosed to investors.[310] This was a material omission.

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[299] Ex. S-218; HT Vol I, p. 51, ln. 3 – p. 55, ln. 5.
[300] *See e.g.* Ex. S-149 at TRI_C005972.
[301] Exs. S-44, S-125, S-221, S-250.
[302] Exs. S-1(j), S-150, S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[303] Exs. S-1(n), S-182, S-183; HT Vol. V, p. 546, lns. 2-20.
[304] Exs. S-256 at pp. 10-12, 14-17, 53-54; S-258 – S-259.
[305] Ex. S-256 at pp. 19, 41, 45-47, 53-54.
[306] Exs. S-44, S-221.
[307] Ex. S-256 at pp. 39-40.
[308] Exs. S-256 at pp. 44-45, S-258 – S-259 at fn. 15& Exhibit 1-M; HT Vol. IX, p. 1073, ln. 18 – p. 1074, ln. 14.
[309] Exs. S-1(g), (h) & (k), S-2(a) & (b).
[310] Exs. S-256 at pp. 45-47, 53-54, S-258 – S-259.

These material omissions and material affirmative misrepresentations constitute at least five instances of violations of A.R.S. § 44-1991 for the twenty-nine TCC 3/08 investors. Thus, TCC violated A.R.S. § 44-1991 one hundred and forty-five times for this offering.

d. TCC is liable for fraud related to the TCC 6/10 offering.

TCC is liable for the antifraud violations used to offer and sell the TCC 6/10 investment. Fraudulent misrepresentations or omissions related to the TCC 6/10 offering include the following:

- *Ownership and security for the subject land.* The TCC 6/10 investment documents advised investors that it was offering "Secured Promissory Notes" and that "[t]he Notes being offered by the Company in this Private Placement Offering are secured by the land Tri-Core Companies LLC purchases".[311] Investors were also orally advised their investment would be securitized by Mexican land.[312] Mogler further represented in a public broadcast during the time the TCC 6/10 investment was offered that investments in Mexican land were "safe" because they are secured by land.[313] At no point were investors advised of any risk that their investment would not be secured. Investors have never been provided any proof that their investment funds were used to purchase land in Mexico, and TCC failed to produce any title documents at hearing.[314] In fact, TCC's representative testified that Lot 3, purportedly the subject of the TCC 6/10 investment, "is in the process of being titled."[315] TCC's representative admitted that as of the date of hearing, Sylvia Torres owns Lot 3, not TCC, and could not explain why title had not been transferred from Ms. Torres.[316] Second, even assuming the purchase is completed, TCC's representative admitted at hearing that due to Mexican law, title to a Mexican parcel such as Lot 3 cannot be held in fee simple by TCC and has to be owned by an S. de R.L. (Mexican corporation) or a Mexican national.[317] Thus, it was a material misstatement to represent that TCC would own the land. Third, investors have been provided no proof that their investment is securitized with any

[311] *See e.g.* Ex. S-187 at TCC_003269, 003279.
[312] *See e.g.* HT Vol. VI, p. 676, ln. 23 – p. 677, ln. 1.
[313] Exs. S-21, S-23, S-26, S-227, S-255(b); HT Vol. II, p. 207, ln. 9 – p. 208, ln. 10, p. 209, ln. 25 – p. 212, ln. 4, p. 224, ln. 21 – p. 229, ln, 21; HT Vol. IV, p. 408, ln. 22 – p. 413, ln. 15, p. 426, ln. 14 – p. 438, ln. 10, HT Vol. V. p. 535, ln. 23 – p. 536, ln. 5.
[314] HT Vol. V, p. 590, lns. 19-21; HT Vol. VI, p. 681, lns. 11-14; HT Vol. VIII, p. 1035, lns. 11-16.
[315] HT Vol. VIII, p. 944, lns. 19-23.
[316] HT Vol. VIII, p. 1031, lns. 5-8, 12-17.
[317] HT Vol. VIII, p. 900, lns. 4-25, p. 990, lns. 9-11.

Mexican land as promised in the investment documents.[318] TCC cannot securitize investors with property it does not own. Again assuming the purchase of Lot 3 is completed, TCC's representative has admitted that securitizing investors with property in Mexico is costly, and that TCC has no cash to securitize investors.[319] Investors were not advised of this risk, and the promise of a securitized note was a material misstatement.

- *Misrepresentation regarding management's qualifications.* The TCC 6/10 investment documents stated that the success of TCC was "dependent on the services and expertise of existing management." The 6/10 investment documents listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[320] In fact, this was a material misstatement because Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[321]
- *Misrepresentation regarding salesmen qualifications regarding commissions.* The TCC 6/10 investment PPM advised investors that the investment was "being sold by the officers and directors of the Company [TCC], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[322] Brian Buckley received sales fees/commissions for numerous TCC 6/10 investors,[323] yet Mr. Buckley was not an officer or director of TCC, a member of NASD (FINRA) or registered as a dealer or salesman in Arizona.[324] Mogler's accounting expert analyzed use of investor funds from 2009 – 2011, and prepared a report regarding the same.[325] The 6/10 TCC offering includes investors that invested in 2010 – 2011,[326] and the accounting expert testified that Mogler

[318] HT Vol. II, p. 245, lns. 6-15; HT Vol. V, p. 590, lns. 7-18; HT Vol. VI, p. 681, ln. 23 – p. 682, ln. 1.
[319] HT Vol. VIII, p. 1009, ln. 16 – p. 1011, ln. 15; HT Vol. IX, p. 1104, lns. 13-18.
[320] *See e.g.* Ex. S-187 at TRI_C003274.
[321] Ex. S-218; HT Vol. I, p. 51, ln. 3 – p. 55, ln. 5.
[322] *See e.g.* Ex. S-187 at TRI_C003280.
[323] Exs. S-47, S-222, S-250.
[324] Exs. S-1(j), S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[325] Exs. S-256 at pp. 10-12, 14-17, 53-54, S-258 – S-259.
[326] Exs. S-47, S-222.

identified relevant investors for the report.[327] Not only did Mr. Buckley receive sales fees/commissions for bringing in investors, but Mogler's accounting expert's report indicates that Casimer Polancheck and his entities, as identified by Mr. Hinkeldey, received approximately hundreds of thousands of dollars from investor funds for referral fees between 2009 – 2011.[328] Neither Polanchek nor his entities were officers or directors of TCC, a member of NASD (FINRA) or registered as dealers or salesmen in Arizona.[329] Thus, this is a material misstatement.

- *Misuse of investor funds.* According to Mogler's expert, between 2010 – 2011, Mogler used approximately $445,000 of investor funds, which include investor funds from the TCC 6/10 offering, for personal use that was not disclosed to investors.[330] This was a material omission.

These material omissions and material affirmative misrepresentations constitute at least five instances of violations of A.R.S. § 44-1991 for the seven TCC 6/10 investors. Thus, TCC violated A.R.S. § 44-1991 thirty-five times for this offering.

e. ERCC is liable for fraud related to the ERCC offering.

ERCC is liable for the fraud used to offer and sell the ERCC investment. Fraudulent misrepresentations or omissions related to the ERCC offering include the following:

- *Use of funds and security for the investments.* The ERCC investment documents state that ERCC was offering "secured Promissory Notes" and that the notes "will be secured by the equipment/compactors purchased."[331] ERCC provided no proof at hearing as to what happened with investor funds, and provided no proof that any equipment had been purchased as the ERCC investment documents promised. The statements regarding use of investor funds were a material misstatement. Investors have been provided no proof that equipment was purchased by ERCC, nor any mechanism to securitize their investments.[332] Thus, the promise of a securitized note to investors was a material misstatement.

[327] Ex. S-256 at pp. 39-40.
[328] Exs. S-256 at pp. 44-45, S-258 – S-259 at fn. 15& Exhibit 1-M; HT Vol. IX, p. 1073, ln. 18 – p. 1074, ln. 14.
[329] Exs. S-1(g), (h) & (k), S-2(a) & (b).
[330] Exs. S-256 at pp. 45-47, 53-54, S-258 – S-259.
[331] *See e.g.* S-191 at ERCC_000305, 00314.
[332] HT Vol. V, p. 601, lns. 2-24.

- *Offer and sale by a non-existent entity.* At least one investor that ERCC admits is an ERCC offering investor was issued a PPM issued by "ERC Compactors **Nevada**, LLC", identified as an Arizona limited liability company.[333] This investor's investment documents are nearly identical to the ERCC offering documents with the exception of the issuer.[334] Mogler signed this investor's investment documents, including the promissory note, on behalf of "ERC Compactors **Nevada**, LLC".[335] However, no entity under the name of "ERC Compactors **Nevada**, LLC" exists or has existed in Arizona.[336] These were material misstatements.
- *Misrepresentation regarding management's qualifications.* The ERCC investment documents also stated that the success of ERCC was "dependent on the services and expertise of existing management." The PPM listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[337] This was a material misrepresentation because Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[338]
- *Misrepresentation regarding salesmen qualifications regarding commissions.* The ERCC investment documents advised investors that the investment was "being sold by the officers and directors of the Company [ERCC], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[339] Brian Buckley received commissions for numerous ERCC investors,[340] yet Mr. Buckley was not an officer or director of ERCC, a member of NASD (FINRA) or registered as a dealer or salesman in

[333] Exs. S-38, S-200, S-235, S-238; HT Vol. II, p. 301, ln. 7 – p. 305, ln.12, p. 306, ln. 21 – p. 307, ln. 24.
[334] HT Vol. II, p. 305, lns. 19-25.
[335] Ex. S-235.
[336] Ex. S-239; HT Vol. II, p. 306, lns. 1-13.
[337] *See e.g.* Ex. S-191 at ERC_C000310.
[338] Ex. S-218; HT Vol. I, p. 51, ln. 3 – p. 55, ln. 5.
[339] *See e.g.* Ex. S-191 at ERC_C000315.
[340] Exs. S-38, S-223, S-250.

Arizona.[341] Mogler's accounting expert analyzed use of investor funds from 2009 – 2011, and prepared a report regarding the same.[342] The ERCC offering includes investors that invested in 2011,[343] and the accounting expert testified that Mogler identified relevant investors for the report.[344] Not only did Mr. Buckley receive sales fees/commissions for bringing in investors, but Mogler's accounting expert's report indicates that Casimer Polancheck and his entities, as identified by Mr. Hinkeldey, received approximately hundreds of thousands of dollars from investor funds for referral fees between 2009 – 2011.[345] Neither Polanchek nor his entities were officers or directors of ERCC, a member of NASD (FINRA) or registered as dealers or salesmen in Arizona.[346] These were material misrepresentations.

- *Misuse of investor funds.* According to Mogler's expert, in 2011, Mogler used approximately $180,000 of investor funds, including investor funds from the ERCC offering, for personal use that was not disclosed to investors.[347] The failure to disclose personal use of funds is a material omission.

These material omissions and material affirmative misrepresentations constitute at least five instances of violations of A.R.S. § 44-1991 for all ten ERCC investors, and another violation (issuance of a note by non-existent ERC Compactors Nevada, LLC) for one ERCC investor. Thus, ERCC violated A.R.S. § 44-1991 over fifty times for this offering.

f. C&D and TCBD are liable for fraud related to the C&D offering.

C&D and TCBD are liable for the fraud used to offer and sell the C&D investment. Fraudulent misrepresentations or omissions related to the C&D offering include the following:

- *Security for the investments.* Investors were told orally and in writing that the C&D investment was secured by assets; specifically, the C&D investment documents stated that the notes were "secured Promissory Notes" and were secured by "real estate in Nevada and

[341] Exs. S-1(j), S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[342] Exs. S-256 at pp. 10-12, 14-17, 53-54, S-258 – S-259.
[343] Exs. S-38, S-223.
[344] Ex. S-256 at pp. 39-40.
[345] Exs. S-256 at pp. 44-45, S-258 – S-259 at fn. 15& Exhibit 1-M; HT Vol. IX, p. 1073, ln. 18 – p. 1074, ln. 14.
[346] Exs. S-1(g), (h) & (k), S-5(a).
[347] Exs. S-256 at pp. 45-47, 53-54, S-258 – S-259.

California. The investors are in 1st lien position and the properties are free and clear."[348] Via a radio program, Mogler publicly offered the recycling investment opportunity during the time that the C&D offering was offered and sold. Mogler promoted it as a "safe place to put [an investor's] money" and stated that "the investor is protected by assets" so that there is a "game plan that is spelled out . . . in terms of getting the investor back their capital."[349] In another broadcast promoting both the recycling and Mexican land investment opportunities, Mogler stated that it was a "good, safe investment" meaning that it was "secured by either land or it's land-backed security."[350] However, these were material misstatements because investors have not received any deeds of trust or securitizing mechanisms for their investments, and have not received proof that C&D owns any particular land in Nevada and California, much less free and clear.[351] In fact, Mr. Hinkeldey testified that Anthony Salazar was not truthful about the ownership of the Nevada property that he believes was pledged as security, and C&D did not own it outright.[352]

- *Misrepresentation regarding salesmen qualifications regarding commissions.* The C&D investment documents advised investors that the investment was "being sold by the officers and directors of the Company [C&D], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[353] Of the investors sold the C&D investments in or from Arizona, Brian Buckley received nearly $15,000 in sales fees/commissions, and even more if all C&D investors are considered.[354] Mr. Buckley was not an officer or director of C&D, a member of NASD (FINRA) or registered

[348] *See e.g.* Ex. S-213 at ACC011090, ACC011098, ACC011128; HT Vol. V, p. 651, lns. 1-15, p. 658, lns. 4-15.
[349] Exs. S-21, S-23, S-26, S-230, S-255(c); HT Vol. II, p. 207, ln. 9 – p. 208, ln. 10, p. 209, ln. 25 – p. 212, ln. 4, p. 224, ln. 21 – p. 229, ln, 21; HT Vol. IV, p. 408, ln. 22 – p. 413, ln. 15, p. 438, ln. 11 – p. 444, ln. 9, HT Vol. V. p. 535, ln. 23 – p. 536, ln. 5.
[350] *Id.*
[351] HT Vol. II, p. 274, lns. 2-13; HT Vol. V, p. 612, ln. 9 – p. 613, ln. 6, p. 658, lns. 16-24; HT Vol. VIII, p. 1043, ln. 25 – p. 1045, ln. 1.
[352] HT Vol. VIII, p. 1045, lns. 6-20.
[353] *See e.g.* Ex. S-213 at ACC011099.
[354] Exs. S-35, S-224, S-250.

as a dealer or salesman in Arizona.[355] Mogler's accounting expert analyzed use of investor funds from 2009 – 2011, and prepared a report regarding the same.[356] The C&D offering includes investors that invested in 2010 – 2011,[357] and the accounting expert testified that Mogler identified relevant investors for the report.[358] Not only did Mr. Buckley receive sales fees/commissions for bringing in investors, but Mogler's accounting expert's report indicates that Casimer Polancheck and his entities, as identified by Mr. Hinkeldey, received approximately hundreds of thousands of dollars from investor funds for referral fees between 2009 – 2011.[359] Notably, Polanchek is listed as the referral source for numerous investors on the C&D investor list.[360] Neither Polanchek nor his entities were officers or directors of C&D, a member of NASD (FINRA) or registered as dealers or salesmen in Arizona.[361]

- *Misuse of investor funds.* According to Mogler's expert, between 2010 – 2011, Mogler used approximately $445,000 of investor funds for personal use, including investor funds from C&D investors, that was not disclosed to investors.[362] These were material misstatements.

These material omissions and material affirmative misrepresentations constitute at least three instances of violations of A.R.S. § 44-1991 for all eleven C&D investors. Thus, C&D violated A.R.S. § 44-1991 over thirty times for this offering, and TCBD also violated A.R.S. § 44-1991 over thirty times.

g. ERCI is liable for fraud related to the ERCI offering.

ERCI is liable for the fraud used to offer the ERCI investment. Fraudulent misrepresentations or omissions related to the ERCI offering include the following:

- *Misrepresentation regarding management of the company.* The ERCI investment documents list Peter A. Salazar as the only individual in management at ERCI and state

[355] Exs. S-1(j), S-250; HT Vol. V, p. 533, ln. 2 – p. 534, ln. 20, p. 536, lns. 6-9, 15 – p. 537, ln. 6, p. 537, ln. 13 – p. 538, ln. 14.
[356] Exs. S-256 at pp. 10-12, 14-17, 53-54, S-258 – S-259.
[357] Exs. S-35, S-224.
[358] Ex. S-256 at pp. 39-40.
[359] Exs. S-256 at pp. 44-45, S-258 – S-259 at fn. 15& Exhibit 1-M; HT Vol. IX, p. 1073, ln. 18 – p. 1074, ln. 14.
[360] Ex. S-35.
[361] Exs. S-1(g), (h) & (k), S-7.
[362] Exs. S-256 at pp. 45-47, 53-54, S-258 – S-259.

that the success of the business is dependent upon his expertise.[363] In fact, at the time this investment was offered, ERCI was a manger-managed limited liability company with Mogler as the manager, and Mogler as the sole signatory on the ERCI bank accounts.[364] There is no evidence that Peter A. Salazar had any affiliation with ERCI. In fact, Mr. Hinkeldey testified at hearing that ERCI was merely a holding company and never an operating company.[365] These were material misrepresentations because investors are entitled to know the actual management running the company, and instead were provided information on Salazar who had no affiliation with ERCI.

- *Security for the investment.* The ERCI investment documents state that "[t]he Notes being offered by the Company in this Private Placement Offering will be secured by property, equipment and commodities such as locomotives located in its new facility in Chicago, Illinois."[366] The investment documents fail to provide investors with enough information to determine if their investment will be adequately securitized, and is a material omission. Further, given that the ERCI investment documents state that operations in Chicago will commence under the name ERC Chicago, LLC,[367] investors holding a note from ERCI may not have the ability to securitize their investments, and this information regarding ownership of the collateral should have been disclosed in order for investors to make an investing decision.

These material omissions and material affirmative misrepresentations constitute at least two instances of violations of A.R.S. § 44-1991 made to the ERCI investment offeree. Thus, ERCI violated A.R.S. § 44-1991 at least twice for this offering.

2. Mogler has Joint and Several Liability Under A.R.S. § 44-1999(B).

The Division alleged and proved at hearing that Mogler was a controlling person of TCC, TCBD, ERCC, and ERCI during the relevant periods pursuant to A.R.S. § 44-1999(B). Section 44-1999(B) of the Securities Act states, "Every person who, directly or indirectly, controls any person liable for a violation of § 44-1991 or 44-1992 is liable jointly and severally with and to the

[363] *See e.g.* Ex. S-202 at ACC000109-110.
[364] Exs. S-6(a), S-19.
[365] HT Vol. IX, p. 1084, lns. 5-20.
[366] *See e.g.* Ex. S-202 at ACC000113.
[367] *See e.g.* Ex. S-202 at ACC000115.

same extent as the controlled person to any person to whom the controlled person is liable unless the controlling person acted in good faith and did not directly or indirectly induce the act underlying the action." Thus, the Securities Act, "attaches vicarious or secondary liability to "controlling persons" as it does to a person or entity that commits a primary violation of §§ 44–1991 or 1992." *Facciola v. Greenberg Traurig, LLP*, 781 F. Supp. 2d 913, 922-23 (D. Ariz. 2011); *see also Eastern Vanguard Forex Ltd. v. Ariz. Corp. Com'n*, 206 Ariz. 399, 412, 79 P.3d 86, 89 (App. 2003).

In Arizona, liability under A.R.S. § 44-1999(B) does not require "actual participation" by the alleged control person. *Eastern Vanguard*, 206 Ariz. at 411, 79 P.3d at 98. In other words, the plain language of A.R.S. § 44-1999(B) "does not support a requirement that a 'controlling person' must have actually participated in the specific action upon which the securities violation is based." *Eastern Vanguard*, 206 Ariz. at 412, 79 P.3d at 99 ("[I]nterpreting § 44-1999(B) to require 'actual participation' in the underlying conduct would frustrate the intent behind the creation of controlling person liability: to impose accountability on those actors who had the authority to control primary violators but were not legally liable under extant legal principles."). Instead, Arizona follows the SEC definition of "control" which is "'the possession, direct or indirect, of the *power to direct or cause the direction of the management and policies of a person,* whether through the ownership of voting securities, by contract, or otherwise.'" *Id.* (citing 17 C.F.R. § 230.405 (1995) (emphasis added). A.R.S. § 44-1999(B) imposes "presumptive control liability on those persons who have the *power* to directly or indirectly control the activities of those persons or entities liable as primary violators of §[] 44-1991 . . ." *Id.* "[T]he evidence need only show that the person targeted as a controlling person had the legal power, either individually or as part of a control group, to control the activities of the primary violator." *Id.*

Here, Mogler was the *manager* of TCC, a manager-managed limited liability company, during the time period that the TCC 2/08, 3/08, and 6/10 offerings were offered and sold.[368]

[368] Exs. S-2(a)&(b), S-220 – S-222.

Mogler was a signatory on the investment documents for the TCC 2/08, 3/08, and 6/10 offerings.[369] Mogler was also a signatory on the TCC bank accounts during the relevant periods of these offerings.[370] Further, Mogler participated in preparing the content for the TCC 2/08, 3/08, and 6/10 offering PPMs.[371] Given these facts, it is clear that Mogler had the power to control, directly or indirectly, the primary violator, TCC, for these three offerings and is therefore liable for the antifraud violations by TCC.

Mogler has the same control person liability for TCBD for the TCMLD and the C&D offerings. Again, Mogler was the *manager* of TCBD, a manager-managed limited liability company during the time that the TCMLD and C&D investments were offered and sold.[372] Mogler was the signatory for TCBD on the consulting agreements with both TCMLD and C&D that allowed TCBD to act as agent for the issuers for these two offerings.[373] Mogler was a signatory on the TCBD bank accounts during the time of these two offerings as well, and received the bank statements at his personal residence.[374] Given that Mogler controlled the bank accounts in which investor funds were deposited for these two offerings,[375] this is significant. Further, for the C&D offering, Mogler signed the C&D investment documents for Peter A. Salazar Jr. for C&D, pursuant to what was represented to investors as a "limited power of attorney".[376] Mogler had the power to control, directly or indirectly, the primary violator, TCBD, who was acting as a dealer for these two offerings and is therefore liable for the antifraud violations by TCBD.

Finally, Mogler is liable as the controlling person of both ERCC and ERCI for those respective offerings. Both ERCC and ERCI were *manager-managed* limited liability companies during the relevant periods, with Mogler acting as the manager.[377] Mogler also was a signatory on

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[369] Exs. S-128 – S-129, S-132 – S-136, S-141 – S-151, S-153 – S-166, S-172, S-184 – S-189, S-221, S-236.
[370] Ex. S-13 at ACC006340-6351.
[371] HT Vol. IX, p. 1058, ln. 23 – p. 1060, ln. 16.
[372] Exs. S-4(a)&(b), S-219, S-224.
[373] Exs. S-124, S-216.
[374] Exs. S-17 at ACC003981-3994, ACC004405-4407, S-27 at p. 9, S-124 at TRI_MDL000121.
[375] *See e.g.* Exs. S-107 at ACC00177, 179, S-119, *see e.g.* Ex. S-213 at ACC011114-11115; HT Vol. VII, p. 839, lns. 6-12.
[376] Exs. S-197, S-205, S-206, S-208, S-210 – S-213, S-234.
[377] Exs. S-5 – S-6, S-204, S-223.

behalf of ERCC on the ERCC investment documents,[378] and was a signatory for ERCI on the ERCI investment documents.[379] Mogler was the sole signatory on the ERCC and ERCI bank accounts during the relevant time period.[380] Mogler had the power to legally control both ERCC and ERCI, the primary violators for these two offerings, and is jointly and severally liable for the antifraud violations for these offerings.

V. Conclusion

As stated in more detail above, the evidence produced at hearing includes the following:

A. TCBD offered and sold unregistered securities in the form of notes for the TCMLD offering within or from Arizona at least sixty-one times;

B. TCBD sold unregistered securities in the form of notes as an unregistered dealer or salesman in or from Arizona to sixty-one investors totaling $1,165,000 for the TCMLD offering;

C. Every offer and sale of the unregistered securities included multiple instances fraud in connection with the offer and sale of securities by TCBD related to the TCMLD offering;

D. TCC offered and sold unregistered securities in the form of notes for the TCC 2/08 offering within or from Arizona at least seven times;

E. TCC sold unregistered securities in the form of notes as an unregistered dealer or salesman in or from Arizona to seven investors totaling $335,000 for the TCC 2/08 offering;

F. Every offer and sale of the unregistered securities included multiple instances fraud in connection with the offer and sale of securities by TCC related to the TCC 2/08 offering;

[378] Exs. S-194 – S-196, S-198 – S-199, S-207.
[379] *See e.g.* Ex. S-202 at ACC000137.
[380] Exs. S-13 at ACC006357-60, S-19 at ACC008522-25.

G. TCC offered and sold unregistered securities in the form of notes for the TCC 3/08 offering within or from Arizona at least twenty-nine times;

H. TCC sold unregistered securities in the form of notes as an unregistered dealer or salesman in or from Arizona to twenty-nine investors totaling $1,158,832 for the TCC 3/08 offering;

I. Every offer and sale of the unregistered securities included multiple instances fraud in connection with the offer and sale of securities by TCC related to the TCC 3/08 offering;

J. TCC offered and sold unregistered securities in the form of notes for the TCC 6/10 offering within or from Arizona at least seven times;

K. TCC sold unregistered securities in the form of notes as an unregistered dealer or salesman in or from Arizona to seven investors totaling $335,000 for the TCC 6/10 offering;

L. Every offer and sale of the unregistered securities included multiple instances fraud in connection with the offer and sale of securities by TCC related to the TCC 6/10 offering;

M. ERCC offered and sold unregistered securities in the form of notes for the ERCC offering within or from Arizona at least ten times;

N. ERCC sold unregistered securities in the form of notes as an unregistered dealer or salesman in or from Arizona to ten investors totaling $880,000 for the ERCC offering;

O. Every offer and sale of the unregistered securities included multiple instances fraud in connection with the offer and sale of securities by ERCC related to the ERCC offering;

P. C&D and TCBD offered and sold unregistered securities in the form of notes for the C&D offering within or from Arizona at least eleven times;

Q. C&D and TCBD sold unregistered securities in the form of notes as an unregistered dealer or salesman in or from Arizona to eleven investors totaling $735,000 for the ERCC offering;

R. Every offer and sale of the unregistered securities included multiple instances fraud in connection with the offer and sale of securities by C&D and TCBD related to the C&D offering;

S. ERCI offered unregistered securities in the form of notes for the ERCI offering within or from Arizona at least one time;

T. ERCI sold unregistered securities in the form of notes as an unregistered dealer or salesman in or from Arizona to one offeree;

U. The offer of the unregistered securities included multiple instances fraud in connection with the offer of securities by ERCI related to the ERCI offering;

V. Mogler acted as the control person for TCBD, TCC, ERCC, and ERCI during the relevant periods of the TCMLD offering, TCC 2/08, TCC 2/08, and TCC 6/10 offerings, ERCC offering, and ERCI offering.

Based upon the evidence admitted during the administrative hearing, the Division respectfully requests this tribunal to:

1. Pursuant to A.R.S. §§ 44-2032(1), order TCBD and Mogler, pursuant to A.R.S. § 44-1999(B), to jointly and severally pay restitution in the amount of $1,165,000, plus prejudgment interest from the date that each investor invested (as set forth in Exhibit S-219) for the TCMLD offering. Pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201.
2. Order TCBD and Mogler to jointly and severally pay an administrative penalty of not more than five thousand dollars ($5,000) for each violation of the Act related to the TCMLD offering, as the Court deems just and proper, pursuant to A.R.S. §§ 44-2036(A) and A.R.S. § 44-1999(B). Due to over five hundred violations of various

provisions of the Securities Act in this offering, the Division recommends TCBD and Mogler jointly and severally pay an administrative penalty in the amount of $275,000 for the TCMLD offering.

3. Pursuant to A.R.S. §§ 44-2032(1), order TCC and Mogler, pursuant to A.R.S. § 44-1999(B), to jointly and severally pay restitution in the amount of $335,000, plus prejudgment interest from the date that each investor invested (as set forth in Exhibit S-220) for the TCC 2/08 offering. Pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201.
4. Order TCC and Mogler to jointly and severally pay an administrative penalty of not more than five thousand dollars ($5,000) for each violation of the Act related to the TCC 2/08 offering, as the Court deems just and proper, pursuant to A.R.S. §§ 44-2036(A) and A.R.S. § 44-1999(B). The Division recommends TCC and Mogler jointly and severally pay an administrative penalty in the amount of $50,000 for the TCC 2/08 offering.
5. Pursuant to A.R.S. §§ 44-2032(1), order TCC and Mogler, pursuant to A.R.S. § 44-1999(B), to jointly and severally pay restitution in the amount of $1,158,832, plus prejudgment interest from the date that each investor invested (as set forth in Exhibit S-221) for the TCC 3/08 offering. Pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201.
6. Order TCC and Mogler to jointly and severally pay an administrative penalty of not more than five thousand dollars ($5,000) for each violation of the Act related to the TCC 3/08 offering, as the Court deems just and proper, pursuant to A.R.S. §§ 44-2036(A) and A.R.S. § 44-1999(B). The Division recommends TCC and Mogler jointly and severally pay an administrative penalty in the amount of $100,000 for the TCC 3/08 offering.

7. Pursuant to A.R.S. §§ 44-2032(1), order TCC and Mogler, pursuant to A.R.S. § 44-1999(B), to jointly and severally pay restitution in the amount of $370,000, plus prejudgment interest from the date that each investor invested (as set forth in Exhibit S-222) for the TCC 6/10 offering. Pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201.
8. Order TCC and Mogler to jointly and severally pay an administrative penalty of not more than five thousand dollars ($5,000) for each violation of the Act related to the TCMLD offering, as the Court deems just and proper, pursuant to A.R.S. §§ 44-2036(A) and A.R.S. § 44-1999(B). The Division recommends TCCD and Mogler jointly and severally pay an administrative penalty in the amount of $30,000 for the TCC 6/10 offering.
9. Pursuant to A.R.S. §§ 44-2032(1), order ERCC and Mogler, pursuant to A.R.S. § 44-1999(B), to jointly and severally pay restitution in the amount of $880,000, plus prejudgment interest from the date that each investor invested (as set forth in Exhibit S-223), minus the $47,477 repaid to specific investors for the ERCC offering. Pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201.
10. Order ERCC and Mogler to jointly and severally pay an administrative penalty of not more than five thousand dollars ($5,000) for each violation of the Act related to the ERCC offering, as the Court deems just and proper, pursuant to A.R.S. §§ 44-2036(A) and A.R.S. § 44-1999(B). The Division recommends ERCC and Mogler jointly and severally pay an administrative penalty in the amount of $50,000 for the ERCC offering.
11. Pursuant to A.R.S. §§ 44-2032(1), order C&D, TCBD, and Mogler, pursuant to A.R.S. § 44-1999(B), to jointly and severally pay restitution in the amount of $735,000, plus prejudgment interest from the date that each investor invested (as set

forth in Exhibit S-224), minus the $196,520.67 repaid to specific investors for the C&D offering. Pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201.

12. Order TCBD and Mogler, jointly and severally, and C&D, individually, to pay an administrative penalty of not more than five thousand dollars ($5,000) for each violation of the Act related to the TCMLD offering, as the Court deems just and proper, pursuant to A.R.S. §§ 44-2036(A) and A.R.S. § 44-1999(B). The Division recommends TCBD and Mogler jointly and severally pay an administrative penalty in the amount of $25,000 for the C&D offering, and that C&D pay an administrative penalty in the amount of $25,000 for the C&D offering.
13. Order ERCI and Mogler to jointly and severally pay an administrative penalty of not more than five thousand dollars ($5,000) for each violation of the Act related to the ERCI offering, as the Court deems just and proper, pursuant to A.R.S. §§ 44-2036(A) and A.R.S. § 44-1999(B). There were at least two instances of fraud and two violations of the registration provisions for the ERCI offer by ERCI. The Division recommends ERCI and Mogler jointly and severally pay an administrative penalty in the amount of $10,000 for the ERCI offering.
14. Order TCBD, TCC, ERCC, ERCI, C&D and Mogler to cease and desist from further violations of the Act pursuant to A.R.S. § 44-2032.
15. Order any other relief this tribunal deems appropriate or just.

RESPECTFULLY SUBMITTED this 1st day of July, 2014.

Stacy L. Luedtke, Staff Attorney for the Securities Division

ORIGINAL and 9 copies of the foregoing
filed this 1st day of July, 2014 with:

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COPY of the foregoing hand-delivered
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The Honorable Marc E. Stern
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